

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review—Review	)	MB Docket No. 06-121
of the Commission’s Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act of	)	
1996	)	
	)	
2002 Biennial Regulatory Review—Review of	)	MB Docket No. 02-277
the Commission’s Broadcast Ownership Rules	)	
and Other Rules Adopted Pursuant to Section	)	
202 of the Telecommunications Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MB Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MB Docket No. 01-317
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	
	)	
Definition of Radio Markets	)	MB Docket No. 00-244

**COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA**

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October 23, 2006

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## **SUMMARY**

The newspaper/broadcast cross-ownership ban is a relic of the 1970s—a time when the original “Big Three” television networks brought us the only national newscasts, cable was in its infancy, and the Internet, cell phones, wi-fi, and iPods were not even visible on the distant horizon. Even then, the Commission acknowledged that the prohibition was not grounded in any concrete evidence of market failure or of any sort of abuse by media owners but, instead, was adopted on the basis of a “mere hoped for gain in diversity.” Over the course of the intervening three decades, the American information and entertainment marketplace has been transformed by round after round of technological advances and business innovations into a dynamic and enormously competitive multimedia, multichannel universe. Today, consumers have virtually limitless choices in news and informational content on every subject imaginable, delivered in an ever-expanding variety of forms to suit every taste and schedule.

Despite the enormous changes in the media marketplace, the evidence of which confronts us at every turn, the FCC’s cross-ownership ban remains in effect, unchanged in more than three decades. The time is long overdue to bring these proceedings to a close, and to square the FCC’s regulatory regime with the realities of the 21<sup>st</sup> Century marketplace.

Notwithstanding the incessant clamor of those who would divert the agency from completion of its statutory mission and delay the implementation of much-needed regulatory relief, the task before the FCC in this proceeding on remand from the U.S. Court of Appeals for the Third Circuit is a limited one. In a series of related notice and comment proceedings spanning the last ten years, under four separate Commission

Chairmen, the agency has thoroughly documented the transformative revolution in the information marketplace that obviates any possible need for heavy-handed government regulation of media ownership, as well as the proven record of innovation and superior local service by owners who have been permitted to combine newspaper and broadcast station operations under one roof. Thus, the FCC need not and should not attempt to begin from scratch in gathering an evidentiary record in the instant rulemaking.

In addition, the Third Circuit squarely agreed with many of the critical determinations the FCC made in 2003 concerning the cross-ownership rule. Specifically, the court affirmed the Commission's determinations that restrictions on cross-ownership are not necessary to preserve marketplace competition and are, in fact, inimical to the agency's localism objectives. Most importantly, the court concurred with the FCC's finding that a blanket cross-ownership restriction no longer serves the public interest and, thus, with the Commission's determination to repeal the absolute prohibition. Accordingly, pursuant to Section 202(h) of the Telecommunications Act of 1996 as well as binding administrative law precedent and First Amendment principles, the agency *must* move forward to eliminate the existing ban.

In this proceeding, the FCC should focus its attention on the court's limited concerns regarding perceived flaws in the agency's previous viewpoint diversity analysis—particularly, its objections to the Diversity Index and its related criticisms of the specific three-tiered Cross-Media Limits adopted in 2003. In responding to the court, the Commission, of course, also must take stock of the changes that have occurred in the media marketplace since 2003. It can hardly be disputed that, during even this limited time frame, the landscape has continued to expand at a head-spinning pace. In particular,

a broad array of print, audio, and video media either have been launched or have developed into far more sophisticated and widely-used outlets.

Perhaps most notably, the Internet has continued to evolve as a fundamental source of both national and local news and information. Its contributions range from the websites of traditional media outlets—which place far more innovative and extensive information online than is feasible via traditional print or broadcast means—to sites maintained by an ever-expanding range of wholly independent “media outlets.” Thus, despite the Third Circuit’s skepticism that the Internet makes a cognizable contribution to viewpoint diversity, the FCC should have no difficulty on remand establishing that this remarkable medium now plays a vital role in the local news and informational marketplace.

Given the broad range of outlets now competing for consumers’ attention, it is not surprising that Americans’ news consumption habits, in particular, have become incredibly fragmented in recent years. Even more so today than in 2003, consumers obtain news and information from a dizzying and ever-shifting mix of media, according to their individual needs and interests at any given time. A natural corollary of this increasing fragmentation has been a marked and widely-reported decline in the prominence and economic performance of local daily newspapers and broadcast outlets. Thus, the need to level the regulatory playing field between these traditional media and their growing list of competitors by repealing the newspaper/broadcast cross-ownership ban is unquestionably even more pressing than it was three years ago.

The case for elimination of the ban is further solidified by the continued evidence that cross-ownership substantially enhances localism without posing any appreciable

threat to viewpoint diversity. The Commission correctly concluded in 2003, and it remains the case today, that existing newspaper/broadcast combinations serve their local markets with more and higher quality news and information than their stand-alone counterparts. The explanation for this consistent pattern is relatively simple. By operating more efficiently and consolidating behind-the-scenes operations, cross-owned properties garner substantial savings that can be refocused on core media functions, including the production of local news, public affairs, and other informational content. At the same time, cross-owned outlets generally have sustained their established practice of maintaining separate news operations and editorial independence.

Meanwhile, in the intervening years since the Third Circuit issued its remand decision, the long outdated cross-ownership rule persists in unnecessarily precluding local publishers and broadcasters from operating more efficiently and bringing the recognized benefits of joint operation to additional communities. Thus, the lengthy record already assembled and the developments over the past three years point to a single, obvious conclusion: it is now time for the agency to finally move forward and eliminate restrictions on newspaper/broadcast cross-ownership.

In order to achieve this objective, of course, the FCC must resolve the Third Circuit's specific objections to the agency's prior use of the Diversity Index. For the FCC to reach a reasoned decision in this proceeding that responds to the court's concerns, however, NAA submits that it is not necessary for the agency to either attempt to fix the perceived flaws in the Diversity Index or to formulate an alternative diversity "metric." In fact, the inherently elusive concept of diversity, coupled with the dizzyingly complex nature of news and information consumption in today's media marketplace, would make

such an exercise hopelessly frustrating and ultimately futile. In any case, the Diversity Index was not a necessary component of the FCC's prior decision to eliminate the blanket cross-ownership ban. An alternative method that would purport to precisely measure the relative importance of local news and informational voices also is not required to resolve, and would needlessly complicate, the issues at stake in this proceeding.

Dispensing with the Diversity Index, the FCC can greatly simplify its analysis in this proceeding by focusing on the straightforward question of whether consumers in individual media markets have a sufficient number of local news and informational outlets available to them to ensure that they will be well-informed and exposed to a variety of viewpoints. So long as local audiences have an ample variety of local news and informational choices at their disposal, the relative audience reach, market share, or the popularity of one outlet vis-à-vis another should be irrelevant. Indeed, NAA submits that the concept of "weighting" media outlets is antithetical to the core meaning of viewpoint diversity. Viewed from this perspective, there can be no question that audience members in local markets of all sizes are abundantly well served by a broad range of traditional and alternative media outlets and that, accordingly, the restrictions on cross-ownership serve no public interest purpose.



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**COMMENTS OF THE NEWSPAPER ASSOCIATION OF AMERICA**

**I. INTRODUCTION**

The Newspaper Association of America (“NAA”)<sup>1</sup> hereby submits its comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) issued by

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<sup>1</sup> NAA is a nonprofit organization that represents the newspaper industry and more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers; those members account for approximately 90 percent of U.S. daily circulation. NAA’s membership also includes many non-daily U.S. newspapers and other newspapers published elsewhere in the western hemisphere as well as in Europe and the Pacific Rim. A number of NAA’s members hold broadcast station licenses, some in the home markets of their newspapers—the great majority of which were issued prior to the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 and therefore were “grandfathered” when the prospective ban was implemented—and some in other markets across the United States. NAA serves the newspaper industry and its individual members in strategic efforts to advocate and communicate the views and interests of newspaper publishers to all levels of government and to advance and support newspapers’ interest in First Amendment issues. In this capacity, NAA has participated in numerous Commission and judicial proceedings as well as a wide variety of federal legislative and regulatory activities affecting the interests of newspaper publishers in general, and the newspaper/broadcast cross-ownership ban in particular.

the Commission on July 24, 2006 in the above-captioned proceedings.<sup>2</sup> As demonstrated herein, the Commission correctly concluded in its 2003 media ownership decision, and the United States Court of Appeals for the Third Circuit affirmed, that the flat prohibition on newspaper/broadcast cross-ownership adopted in 1975 does not serve the public interest. Therefore, the blanket restriction must now be eliminated. Similarly, the court of appeals affirmed the FCC's conclusions in 2003 that the ban does not advance the Commission's competition or diversity objectives and is demonstrably counterproductive with respect to the production and distribution of news and other programming of interest to the local market. Additional evidence concerning the continuing technological advances and other developments in the information marketplace and the performance of cross-owned media outlets in the three years since the FCC's decision resoundingly confirms each of these conclusions. Accordingly, consistent with its statutory mandate and the requirements of administrative law and First Amendment jurisprudence, the Commission must move forward promptly to complete the task at hand, respond to the court's specified concerns, and eliminate the anarchistic, discriminatory, and counterproductive ban on newspaper/broadcast cross-ownership.

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<sup>2</sup> 2006 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; 2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets; Definition of Radio Markets, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006) ("Further Notice"); 2006 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, Order, DA 06-1663 (rel. Sept. 18, 2006) (order extending comment deadline until Oct. 23, 2006 and the reply comment deadline until Dec. 21, 2006).

**II. ONLY A LIMITED REVIEW OF ISSUES RELATED TO NEWSPAPER/BROADCAST CROSS-OWNERSHIP IS REQUIRED IN THIS PROCEEDING**

The tasks that the Commission must accomplish in order to fulfill the Third Circuit’s remand directive with respect to the 2003 newspaper/broadcast cross-ownership decision are, at bottom, relatively narrow in scope. First, over the course of a series of inquiries and interrelated rulemakings now spanning a decade, the FCC already has accumulated an enormous record concerning the potential public interest benefits and lack of corresponding harms associated with elimination of the newspaper/broadcast cross-ownership ban. There is no need, and in fact it would constitute a waste of agency resources, for the Commission to start from scratch on that front.

Second, the Third Circuit squarely agreed with many of the critical determinations the FCC made in 2003 concerning the cross-ownership ban. Most importantly, the court affirmed the Commission’s finding that the absolute ban no longer serves the public interest. Thus, pursuant to Section 202(h) of the Telecommunications Act of 1996 (“1996 Act”)<sup>3</sup> as well as general administrative law and First Amendment principles, the agency *must* eliminate the absolute prohibition in this proceeding. In carrying out this obligation, the FCC can build on the comprehensive study and painstaking analysis that has gone into its prior determinations and focus its efforts here on addressing the court’s specified concerns regarding perceived flaws in the Diversity Index and the three-tiered Cross-Media Limits adopted in 2003.

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<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

**A. The FCC Already Has Amassed An Enormous Record Demonstrating That Repeal Of The Newspaper/Broadcast Cross-Ownership Ban Will Serve The Public Interest**

The *Further Notice* represents the sixth notice and comment proceeding the FCC has conducted in the past ten years to consider the continuing validity of the 1975 newspaper/broadcast cross-ownership ban.<sup>4</sup> During the course of these interrelated and protracted proceedings, the Commission has received and analyzed an extraordinary amount of information from a wide range of interested parties, including the full gamut of industry representatives, many public interest organizations, and an unusually large number of private citizens. Overall, the agency has accumulated an overwhelming amount of written evidence and analysis regarding the cross-ownership rule, including numerous empirical studies, a mountain of anecdotal evidence, and extensive social, economic, and legal analysis. Thus, before even launching this further proceeding, the FCC already had before it a massive record demonstrating unequivocally that repeal of the newspaper ban is long overdue and, in fact, is required to satisfy the congressional

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<sup>4</sup>See *Newspaper/Radio Cross-Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13,003 (1996) (MM Docket No. 96-197 established Oct. 1996) (“*Newspaper/Radio Cross-Ownership Waiver Policy NOI*”); *1998 Biennial Regulatory Review—Review of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Notice of Inquiry, 13 FCC Rcd 11,276 (1998) (MM Docket No. 98-35 established Mar. 1998) (“*1998 Biennial Review NOI*”); *2000 Biennial Regulatory Review*, Staff Report, CC Docket No. 00-175 (established Sept. 2000); *Cross-Ownership of Broad. Stations and Newspapers; Newspaper/Radio Cross-Ownership Policy*, Order and Notice of Proposed Rulemaking, 16 FCC Rcd 17,283 (2001) (MM Docket No. 01-235 established Sept. 2001) (“*2001 Newspaper/Broadcast Cross-Ownership NPRM*”); *2002 Biennial Regulatory Review—Review of the Comm’n’s Broad. Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets-Definition of Radio Markets*, Notice of Proposed Rulemaking, 17 FCC Rcd 18,503 (2002) (MB Docket No. 02-277 established Sept. 2002) (“*2002 Omnibus Media Ownership NPRM*”); *Further Notice*, 21 FCC Rcd 8834.

NAA hereby incorporates by reference its comments in the two most recent proceedings. See Comments of the Newspaper Association of America in MB Docket No. 01-235 (filed Dec. 3, 2001) (“*NAA 2001 Comments*”); Reply Comments of the Newspaper Association of America in MB Docket No. 01-235 (filed Feb. 15, 2002) (“*NAA 2001 Reply Comments*”); Comments of the Newspaper Association of America in MB Docket No. 02-277 (filed Jan. 2, 2003) (“*NAA 2003 Comments*”); Reply Comments of the Newspaper Association of America in MB Docket No. 02-277 (filed Feb. 3, 2003) (“*NAA 2003 Reply Comments*”).

mandate set forth in Section 202(h) of the 1996 Act and to advance the Commission's public interest objectives.<sup>5</sup>

To put the FCC's task in this proceeding in proper perspective, it is important to note that the newspaper/broadcast cross-ownership ban has now been in existence, without *any* modification, for more than 30 years. By contrast, each of the other local ownership rules adopted by the agency in the 1960s and 1970s has been relaxed at least once.<sup>6</sup> Moreover, even in its decision adopting the ban, the Commission acknowledged the potential detriments of the prohibition and the uncertain foundation on which it was enacted. In particular, the agency recognized the pioneering spirit of cross-owners and specifically concluded that newspaper-affiliated stations tended to be superior licensees, particularly in terms of locally oriented service.<sup>7</sup> To justify the restriction when it was adopted three decades ago, moreover, the FCC relied on what the agency itself acknowledged to be a "mere hoped for gain in diversity."<sup>8</sup>

Given its speculative origins, it is not at all surprising that the cross-ownership ban has long been in question at the Commission. As early as 1996, in approving the

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<sup>5</sup> As detailed below, the repeated opportunities for public comment and the sheer volume of written submissions received by the Commission in proceedings spanning ten full years render incomprehensible the claims of proponents of retaining strict ownership limits that the 2003 decision was reached "under cover of night," or without adequately seeking the input of the American people. As former Chairman Michael Powell recently observed, "there was ample evidence supporting and opposing every conceivable view on [the] hotly debated topic" of media ownership in 2003. John Eggerton, *Powell: Politics Quashed No Reports*, Broadcasting and Cable, Sept. 19, 2006.

<sup>6</sup> See, e.g., *Review of the Comm'n's Regulations Governing Television Broad.*, 14 FCC Rcd 12,903 (1999) (relaxing local television ownership and television/radio cross-ownership restrictions); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992) (relaxing restrictions on local radio ownership); 1996 Act, §202(b) (mandating further relaxation of local radio ownership rule); 1996 Act, §202(f) (repealing statutory cable/broadcast cross-ownership ban).

<sup>7</sup> *Multiple Ownership of Standard, FM & Television Broad. Stations*, 50 F.C.C. 2d 1046, 1074, 1078-81 (1975) ("1975 Multiple Ownership Report").

<sup>8</sup> *Id.* at 1078.

merger of ABC and The Walt Disney Company, the agency stated its intention to “commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously.”<sup>9</sup> Then-Chairman Reed Hundt, appointed by President Clinton, issued a separate statement emphasizing his concern that “there is reason to believe that . . . the newspaper-broadcast cross-ownership rule, is right now impairing the future prospects of an important national source of education and information: the newspaper industry.”<sup>10</sup> The FCC subsequently reneged on the promise to conduct a broad review, however, initiating an inquiry only with respect to the much narrower issue of amending the existing waiver policy for newspaper/*radio* cross-ownership.<sup>11</sup>

Without completing that proceeding, the FCC released in March 1998 a notice of inquiry to commence the first biennial review proceeding pursuant to Section 202(h) of the 1996 Act.<sup>12</sup> That inquiry represented the Commission’s first effort to carry out the congressional mandate to periodically determine whether any of its broadcast ownership restrictions rules “remain necessary in the public interest as the result of competition” and to repeal or modify any rules that do not meet this stringent test.<sup>13</sup> In addition to seeking comment on all of its media ownership rules, the agency noted that it “anticipate[d]

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<sup>9</sup> *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5888 (1996).

<sup>10</sup> *Id.* at 5906. *See also id.* at 5915-26 (Separate Statement of Commissioner Barrett) (“The fact that this rule is over twenty (20) years old provides an even more compelling justification for the Commission’s initiation of a rulemaking proceeding to determine the future applicability of this rule.”).

<sup>11</sup> *See Newspaper/Radio Cross-Ownership Waiver Policy NOI*, 11 FCC Rcd 13,003.

<sup>12</sup> *1998 Biennial Review NOI*, 13 FCC Rcd 11,276.

<sup>13</sup> 1996 Act, §202(h).

taking action in the [newspaper/radio waiver proceedings] during 1998.”<sup>14</sup> The Commission, however, took no action in the 1998 biennial review proceeding at all until June 2000 when, after Congress had to intervene to set a specific deadline, the agency finally issued its *1998 Biennial Review Report*.<sup>15</sup> Recognizing that “there may be circumstances in which the rule may not be necessary to achieve its public interest [objectives],” the FCC committed to “initiate a rulemaking proceeding to consider tailoring the rule accordingly.”<sup>16</sup>

Well over a year later, the Commission finally issued the long-awaited notice of proposed rulemaking, seeking comment on a broad list of questions ranging from retention of the rule in its existing form to complete repeal.<sup>17</sup> Extensive comments were filed in this proceeding by a wide array of industry participants, public interest organizations, and individual consumers. In addition to thousands of comments provided by private citizens, over 40 interested parties filed more than 3,000 pages of major comments and/or reply comments in the proceeding.<sup>18</sup>

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<sup>14</sup> *1998 Biennial Review NOI*, 13 FCC Rcd at 11280.

<sup>15</sup> 15 FCC Rcd 11,058 (2000), *vacated on other grounds by Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048, *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002).

<sup>16</sup> *Id.* at 11,102.

<sup>17</sup> *2001 Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd 17,283. In the interim, the FCC had concluded, in the space of just seven months, its 2000 Biennial Regulatory Review. The Commission’s *2000 Biennial Regulatory Review Report*, 16 FCC Rcd 1207 (2001), however, was devoted largely to a recitation of the conclusions reached in the 1998 Biennial Review and a concurrent proceeding on television ownership matters, and did not alter the conclusions reached in those proceedings. *See id.* at 1217, 1225-26.

<sup>18</sup> *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13,620, 14,013 (App. A) (2003) (listing commenters in response to *2001 Newspaper/Broadcast Cross-Ownership NPRM*) (“*2003 Order*”). Included in the list of commenters were: (1) American Federation of

Although the 2001 cross-ownership proceeding was ripe for decision, the FCC determined instead to roll it into its *2002 Omnibus Rulemaking*, which included consideration of several other media ownership rules and was designated as the Commission's *2002 Biennial Review*.<sup>19</sup> The Omnibus proceeding was conducted in response to a series of decisions by the United States Court of Appeals for the D.C. Circuit repudiating the reasoning underlying the FCC's decisions to retain certain of its broadcast ownership restrictions in past biennial review orders. In both *Fox Television Stations v. FCC* and *Sinclair Broadcast Group v. FCC*, the court strongly reprimanded the agency for failing to buttress its decisions to retain national and local limits on television station ownership with solid factual evidence or logical reasoning.<sup>20</sup>

In response to these judicial admonishments, the FCC endeavored to make this most recent review of its media ownership restrictions the "most comprehensive" ever undertaken by the agency.<sup>21</sup> Once again, extensive comments on cross-ownership were

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Labor and Congress of Industrial Organizations ("AFL-CIO"); (2) Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights, and Media Access Project; (3) Freedom of Expression Foundation, Inc.; (4) Media Institute; and (5) United Church of Christ, Office of Communications, National Organization for Women, and Media Alliance. All were filed on December 3, 2001 in MB Docket 01-235. Interestingly, many of these parties are among the chorus clamoring for even more rounds of comments, public hearings, and in the end, of course, more regulation, notwithstanding the absence of record evidence supporting their demands.

<sup>19</sup>*2002 Omnibus Media Ownership NPRM*, 17 FCC Rcd 18,503.

<sup>20</sup>*Fox Television Stations*, 280 F.3d at 1048 (remanding the FCC's national television station ownership rule and vacating its television/cable cross-ownership restriction); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C.Cir.2002) (remanding the local television ownership rule to the Commission for further consideration).

<sup>21</sup>*FCC Sets Limits on Media Concentration; Unprecedented Public Record Results in Enforceable and Balanced Broadcast Ownership Rules*, FCC News Release, 2003 FCC LEXIS 3121 (2003) (FCC decision "represents the most comprehensive review of media ownership regulation in the agency's history") ("*2002 Omnibus Media Ownership News Release*").



submitted by a very wide range of parties.<sup>22</sup> In conjunction with this proceeding, the FCC also established a Media Ownership Working Group (“MOWG”), which commissioned a number of independent studies, including several that focused specifically on issues related to newspaper/broadcast cross-ownership.<sup>23</sup> As the Third Circuit observed in its review of the agency’s decision in the proceeding, “interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to respond to the issues identified in the Commission’s Notice.”<sup>24</sup> Overall, the rulemaking “span[ned] 20 months and encompass[ed] a public record of more than 520,000 comments.”<sup>25</sup> After

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<sup>22</sup> Among the many comments submitted in the proceeding were those of: (1) American Federation of TV & Radio Artists and Writers Guild of America East (“AFTRA”); (2) Center for the Creative Community Inc.; (3) Communications Workers of America, The Newspaper Guild/CWA, National Association of Broadcast Employees and Technicians/CWA, Printing, Publishing, and Media Workers Section/CWA; (4) Consumers Union, Consumer Federation of America, Center for Digital Democracy, and Media Access Project; and (5) Office of Communication, Inc. of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women’s Institute for Freedom of the Press. All were filed in MB Docket No. 02-277 on January 2, 2003.

<sup>23</sup> See, e.g., Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*, released in MB Docket No. 02-277 (Sept. 2002), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A12.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf) (last visited Sept. 18, 2006) (“MOWG Spavins Study”); David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Election Campaign*, released in MB Docket No. 02-277 (Sept. 2002), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-226838A7.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf) (last visited Sept. 18, 2006).

<sup>24</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 386 (3d Cir. 2004) (“*Prometheus*”).

<sup>25</sup> 2002 Omnibus Media Ownership News Release, 2003 FCC LEXIS at 3121. Citing a prior statement by Commissioner Adelstein, the Third Circuit stated that “nearly two million people weighed in [to the Omnibus Rulemaking] by letters, postcards, e-mails, and petitions to oppose further relaxation of the rules.” *Prometheus*, 373 F.3d at 386. The vast majority of these comments were brief emails filed by individual private citizens. Many of the filings falling into this category contained nearly identical statements and appear to have been stimulated by activist group campaigns. NAA submits that the success of these organizations in publicizing and spurring public participation in the FCC’s proceeding via the Internet by itself confirms NAA’s contention herein that the Internet now serves a vital and ever-expanding role in disseminating news and information to consumers. See Section III.B., *infra*.

extensive analysis of the mammoth record in the proceeding, the Commission released the text of its 258-page *Omnibus Media Ownership Order* (“2003 Order”) in July 2003.<sup>26</sup>

Accordingly, as the FCC launches its most recent proceeding to consider the soundness of cross-ownership restrictions pursuant to the directives of the Third Circuit, it does so with a wealth of historical perspective and accumulated knowledge. The record already in existence, and the agency’s pre-existing analysis thereof, definitively show that repeal of the long outdated and counterproductive newspaper/broadcast cross-ownership rule will benefit both consumers and media operators without posing any appreciable countervailing threats to the public interest. As explained in detail below, the additional developments that have occurred in the marketplace even since the agency last examined the issue three years ago resoundingly confirm these conclusions.<sup>27</sup> These recent occurrences also bring into stark relief the urgent need for Commission action to relieve newspaper publishers and broadcasters of this unnecessary and crippling regulatory restriction on their freedom to compete in the burgeoning media marketplace.

**B. The Third Circuit Upheld The FCC’s Critical Determinations Regarding Newspaper/Broadcast Cross-Ownership**

Based on its own empirical studies, as well as the comprehensive evidence provided by commenters, the Commission determined in its *2003 Order* that its absolute ban on newspaper/broadcast cross-ownership could no longer be justified, and that, quite the contrary, elimination of the prohibition would *promote* the FCC’s public interest

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<sup>26</sup> *2003 Order*, 18 FCC Rcd 13,620. The “Anti-Deregulatory Parties” claimed in their appeal of the 2003 Order that the FCC “rushed to judgment” in that proceeding and provided inadequate notice of the action taken with respect to newspaper/broadcast cross-ownership. As NAA and other parties explained in detail in that case, these complaints were factually inaccurate and plainly at odds with the requirements of the Administrative Procedure Act. See Brief for Intervenor Newspaper Association of America, *et al.* in *Prometheus Radio Project, et al. v. Federal Communications Commission*, at 15-22, D.C. Cir. No.03-3388 (Nov. 3, 2003) (“*Newspaper Intervenor Third Circuit Brief*”).

<sup>27</sup> See Section III.A.-B., *infra*.

goals of competition, localism, and diversity.<sup>28</sup> Although the Third Circuit identified certain perceived faults with the FCC’s modified cross-ownership rules,<sup>29</sup> the court agreed with all of the critical findings underlying the Commission’s determination that the cross-ownership prohibition could not be maintained in its current form, and that, at the very least, substantial relaxation was warranted. Thus, the court found that the FCC had provided “reasoned analysis” to support its “determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest.”<sup>30</sup>

First, based on the conclusions of one of the MOWG studies and extensive information submitted by commenters, the FCC determined that most advertisers simply “do not view newspapers, television stations, and radio stations as close substitutes.”<sup>31</sup> Accordingly, the Commission found that elimination of the ban could not “adversely affect competition in any product market.”<sup>32</sup> No party directly challenged this aspect of the FCC’s 2003 Order,<sup>33</sup> and the Third Circuit expressly agreed with the agency’s determination that “repealing the cross-ownership ban was necessary to promote competition.”<sup>34</sup>

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<sup>28</sup>2003 Order, 18 FCC Rcd at 13,747 (¶ 327).

<sup>29</sup>See Section II.C, *infra*.

<sup>30</sup>*Prometheus*, 373 F.3d at 398; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>31</sup>2003 Order, 18 FCC Rcd at 13,749 (¶ 332); *see id.* at 13713 (¶ 243) (addressing the radio advertising market and stating that “[w]e conclude that advertisers do not view radio stations, newspapers, and television stations as substitutes”); *see Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>32</sup>2003 Order, 18 FCC Rcd at 13,749 (¶ 332); *Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>33</sup>*Prometheus*, 373 F.3d at 398 (noting objections to “the localism and diversity components of the Commission’s rationale”).

<sup>34</sup>*Id.* at 400-01; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

Second, the FCC found that restrictions on newspaper/broadcast cross-ownership were “not necessary to promote broadcasters’ provision of local news and information,” and, most significantly, that the existing ban “actually works to inhibit such programming.”<sup>35</sup> Among a very substantial body of evidence, these conclusions were supported by compelling real-world examples provided by individual operators of existing newspaper/broadcast combinations. In particular, the agency relied on information provided by a substantial number of newspaper/broadcast combinations that were “grandfathered” in 1975 and that have continued to set high standards in local news and public service programming efforts. As the Commission recognized, this evidence convincingly “illustrate[d] how combining a newspaper’s local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community.”<sup>36</sup> The agency further noted that this was not at all surprising, as “[t]hese results flow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies . . . which can be realized through common ownership of two media outlets.”<sup>37</sup>

The FCC’s own studies, moreover, confirmed the real-world evidence submitted by commenters. Assessing the local news operations at a wide range of broadcast television network affiliates, one major study concluded that “[a]ffiliates co-owned with newspapers experience noticeably greater success under our measures of quality and

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<sup>35</sup> 2003 Order, 18 FCC Rcd at 13,753 (¶ 342).

<sup>36</sup> *Id.* at 13,756 (¶ 347).

<sup>37</sup> *Id.*; see *Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24). As NAA previously has demonstrated to the Commission, the evidence provided by existing newspaper/broadcast combinations (most of which were grandfathered by the FCC when the rule was adopted in 1975) provide substantial and concrete case studies of the potential benefits associated with eliminating the decades-old cross-ownership ban. See, e.g., *NAA 2001 Comments* at Section IV.A.

quantity of local news programming than other network affiliates.”<sup>38</sup> More specifically, the study revealed that newspaper-owned affiliates provided an average of 50 percent more weekly hours of local news and public affairs programming than their standalone counterparts and substantially outperformed other stations in news ratings and industry awards.<sup>39</sup>

The Third Circuit agreed that the outright ban on newspaper/broadcast cross-ownership was not necessary to further—and in fact undermined—the FCC’s localism objective.<sup>40</sup> Specifically, the court found that the ban is affirmatively counterproductive when it comes to localism, because it prevents combinations that would allow for the production of more and higher quality local news and other local programming.<sup>41</sup>

Third, the FCC found that “a blanket prohibition on the common ownership of broadcast stations and daily newspapers . . . can no longer be justified as necessary to achieve and protect diversity.”<sup>42</sup> Again, the agency cited evidence demonstrating that cross-ownership “creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public.”<sup>43</sup> The FCC also emphasized that the “average American has a far richer and more varied range of media voices from which to choose today than at any time in history.”<sup>44</sup> Included in

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<sup>38</sup> *MOWG Spavins Study* at Section I.

<sup>39</sup> *Id.*

<sup>40</sup> *Prometheus*, 373 F.3d at 398-99; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>41</sup> *Prometheus*, 373 F.3d at 398-99; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>42</sup> *2003 Order*, 18 FCC Rcd at 13,760 (¶ 355); *see Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>43</sup> *2003 Order*, 18 FCC Rcd at 13,760 (¶ 355); *see Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>44</sup> *2003 Order*, 18 FCC Rcd at 13,766 (¶ 366); *see Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

the agency's decision was a 21-page assessment of the then-current media landscape and the changes that had taken place since the broadcast ownership rules were implemented in the 1960s and 1970s.<sup>45</sup> Based on this extensive analysis, the Commission unequivocally found that "[t]oday's media marketplace is characterized by abundance."<sup>46</sup> In particular, it observed that "[t]raditional modes of media . . . have greatly evolved since the Commission first adopted media ownership rules . . . and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more [audience] control" than ever before.<sup>47</sup> Against this rich and diverse backdrop, the FCC determined, "the influence of any single [voice] is sharply attenuated" and "there will be a plethora of voices in most or all markets absent the [newspaper/broadcast cross-ownership] rule."<sup>48</sup>

As it had with the agency's conclusions relating to competition and localism, the Third Circuit affirmed the FCC's determination that the ban was not necessary to promote diversity.<sup>49</sup> The Court stated that, "the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the cross-ownership ban."<sup>50</sup> The Third Circuit further agreed that "record evidence suggests that cable and the Internet supplement the viewpoint diversity provided by broadcast and newspaper outlets in local markets,"

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<sup>45</sup> See *2003 Order* at 13,647-67 (¶¶ 86-128).

<sup>46</sup> *Id.* at 13,647 (¶ 86); see *Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>47</sup> *2003 Order*, 18 FCC Rcd at 13,647 (¶ 86); see *Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>48</sup> *2003 Order*, 18 FCC Rcd at 13,766 (¶¶ 366, 377); see *Further Notice*, 21 FCC Rcd at 8844-45 (¶ 24).

<sup>49</sup> *Prometheus*, 373 F.3d at 399-400; see *Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>50</sup> *Prometheus*, 373 F.3d at 399-400; see *Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

rendering it, in the court’s view, perfectly “acceptable for the Commission to find that [these media] contribute to viewpoint diversity,” and that maintenance of the absolute ban on newspaper/broadcast cross-ownership was not necessary to protect diversity.<sup>51</sup>

**C. In This Proceeding, The Commission Should Focus Its Attention On The Court’s Specified Concerns Regarding Perceived Flaws In The Diversity Index And The Proposed Cross-Media Limits**

While agreeing with the FCC’s conclusion that maintenance of an absolute prohibition on newspaper/broadcast cross-ownership would not serve the public interest, the Third Circuit remanded the specific Cross-Media Limits that the Commission had adopted in place of the ban because of flaws that it perceived in the “Diversity Index” used by the agency as an analytical tool in developing the revised restrictions.<sup>52</sup> In doing so, however, the court applauded the Commission’s “recogni[tion] that ownership limits impede speech opportunities for both broadcasters and newspaper[.]” publishers, as well as the FCC’s attempt to “craft new limits ‘as narrowly as possible.’”<sup>53</sup> The Third Circuit also praised the agency’s efforts to identify “‘at risk’ local markets—those with high levels of viewpoint concentration—” and its commitment to “focusing its regulation on

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<sup>51</sup>*Prometheus*, 373 F.3d at 399-400; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>52</sup>*Prometheus*, 373 F.3d at 399-400; *see Further Notice*, 21 FCC Rcd at 8846 (¶ 28). The Cross-Media Limits would have replaced both the newspaper/broadcast and the television/radio cross-ownership rules with three different categories of restrictions based on the number of commercial and noncommercial television stations in the relevant locale. First, in markets with three or fewer TV stations, the FCC would not have permitted cross-ownership among TV stations, radio stations, and daily newspapers. Second, in markets with between four and eight TV stations, the agency would have permitted one of the three following combinations: (1) one or more daily newspaper(s), one TV station, and up to 50 percent of the radio stations permissible under the local radio ownership limits; (2) one or more daily newspaper(s), and as many radio stations as can be owned pursuant to the local radio ownership limits; or (3) two TV stations (so long as ownership would be permissible under the local television ownership rule) and as many radio stations as the local radio ownership limits permit, but no daily newspapers. Third, in local markets with nine or more TV stations, the Commission would have allowed any newspaper and broadcast cross-media combinations, so long as they complied with the local TV ownership rule and local radio ownership rule. *2003 Order*, 18 FCC Rcd at 13,922-927 (App. H).

<sup>53</sup>*Prometheus*, 373 F.3d at 402 (quoting *2003 Order*, 18 FCC Rcd at 13,793 (¶ 441)).

those markets” as a means to “avoid needlessly overregulating markets with already ample viewpoint diversity.”<sup>54</sup>

As the *Further Notice* recognizes, the court’s remand was therefore quite narrow, focused on the specific Cross-Media Limits selected by the FCC in the 2003 *Order* and the identified faults or inconsistencies in the Diversity Index.<sup>55</sup> In this proceeding, then, the FCC is not writing on a blank slate. Much of the work necessary to reach a decision already has been done, and affirmed by the court of appeals. Thus, the agency can build on its prior efforts rather than repeating them, and should focus in this further proceeding on addressing the limited concerns that the Third Circuit expressly articulated.<sup>56</sup>

In responding to the court’s directive, moreover, the Commission should be mindful that neither the Third Circuit’s decision, the APA, nor the Communications Act of 1934, as amended, requires it to draw lines with absolute precision. Indeed, the Third Circuit itself confirmed that the FCC has considerable latitude in this area.<sup>57</sup> Chief Judge Scirica, although dissenting in *Prometheus*, agreed with the panel majority on this point: “Given the dynamic nature of the industry, the task of crafting a regulatory structure that

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<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 402-11; see *Further Notice*, 21 FCC Rcd at 8846 (¶ 28).

<sup>56</sup> Indeed, under governing principles of administrative law, changing course at this point, as suggested by some advocates of retaining or even increasing ownership restrictions, would require clear and compelling evidentiary support and a detailed and persuasive explanation for altering the direction laid out in the 2003 decision. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored...”); see also *Motor Vehicle Manufacturers Ass’n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987).

<sup>57</sup>*Prometheus*, 373 F.3d at 389-90 (stating, for example, that “the traditional APA standard of review is even more deferential where the issues involve elusive and not easily defined areas such as programming diversity in broadcasting”) (internal quotation marks omitted, quoting *Sinclair Broad. Group*, 284 F.3d at 159).



reflects the realities of the media marketplace requires the Commission to make predictive judgments about the future.”<sup>58</sup> Accordingly, the federal courts, reviewing FCC decisions under the APA, “have consistently recognized the Commission’s authority and unique expertise in making such estimations.”<sup>59</sup> Indeed, as the Supreme Court has recognized in the very context of the FCC’s ownership rules, “complete factual support in the record for the Commission’s judgment or prediction is not possible or required; ‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’”<sup>60</sup>

**D. The FCC Is Compelled To Eliminate The Blanket Cross-Ownership Ban In This Proceeding**

1. *The Third Circuit’s Affirmance Of The FCC’s Finding That An Absolute Ban On Cross-Ownership Is Not Necessary In The Public Interest Mandates Elimination Of The Rule*

In the *2003 Order*, the FCC acknowledged that Section 202(h) of the 1996 Act embodies a “presumption in favor of repealing or modifying the ownership rules” that means, at the very least, that once a regulation is shown to be no longer necessary, it must be repealed or modified.<sup>61</sup> Although taking issue with the “presumption” language employed by the Commission, the Third Circuit wholeheartedly agreed.<sup>62</sup> As the court

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<sup>58</sup>*Id.* at 439 (Scirica, C.J., dissenting).

<sup>59</sup>*Id.* (citing *Cellco P’shp v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004)).

<sup>60</sup>*FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

<sup>61</sup>*2003 Order*, 18 FCC Rcd at 13,624 (¶ 11).

<sup>62</sup> As explained in detail in prior filings, NAA disagrees with the Third Circuit’s limited reading of the Section 202(h) mandate. NAA submits that, consistent with the deregulatory goals underlying the 1996 Act, Section 202(h) imposes a heightened burden on the FCC to justify the retention of existing broadcast ownership regulations and to relax or eliminate those that are outdated. Traditional tools of statutory construction, including the language of the Act, the design and context of the statute, and its legislative history, all confirm that Congress expected Section 202(h) to drive comprehensive deregulation. Among

explained: “A regulation deemed useful when promulgated must remain so. If not, it must be vacated or modified.”<sup>63</sup> Further, “[i]n a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified.”<sup>64</sup>

As discussed above, the Commission already has found, and the Third Circuit has agreed, that the ban on newspaper/broadcast cross-ownership is not necessary to fulfill the FCC’s interests in promoting competition, localism, or viewpoint diversity, and that the prohibition is in fact affirmatively counterproductive.<sup>65</sup> Under the reading of the Commission’s Section 202(h) obligations adopted in the *2003 Order* and elaborated upon by the Third Circuit, this finding mandates that the FCC eliminate the absolute newspaper/broadcast cross-ownership ban in this proceeding.

2. *The FCC Must Take Deregulatory Action Based On Its Obligation To Change Its Rules To Reflect Current Market Realities And In View Of Its Clear First Amendment Obligations*

In addition to its decision that Section 202(h) requires repeal or modification of ownership rules once the FCC determines that they are no longer necessary in the public interest, the Third Circuit’s ruling makes clear that the Commission bears a heavy burden in this proceeding to update its rules to reflect current market realities. As the FCC previously has explained, and as the Third Circuit agreed, “[t]he text and legislative history of the 1996 Act indicate that Congress intended periodic reviews” under Section

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other filings, NAA has established that Section 202(h) imposes a stricter legal standard in prior pleadings filed in relation to the FCC’s *2003 Order*. See *NAA 2003 Comments* at 24-34 ; *NAA 2003 Reply Comments* at 6-13.

<sup>63</sup>*Prometheus*, 373 F.3d at 395.

<sup>64</sup>*Id.*

<sup>65</sup>See Section II.B, *supra*.

202(h) “to operate as an ‘ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace’ resulting from that Act’s relaxation of the Commission’s regulations, including the broadcast media ownership regulations.”<sup>66</sup> Put another way, “the periodic review provisions require the Commission to ‘monitor the effect of . . . competition . . . and make appropriate adjustments to its regulations.’”<sup>67</sup>

In making determinations under Section 202(h), the FCC must analyze the current state of competition and reevaluate its rules in light of changed market conditions.<sup>68</sup> Indeed, the Third Circuit confirmed that Section 202(h) explicitly “[r]ecogniz[es] that competitive changes in the media marketplace could obviate the public necessity for some of the Commission’s ownership rules.”<sup>69</sup> Thus, the court held that the statute “requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain ‘necessary in the public interest.’”<sup>70</sup> The statute’s essential “deregulatory” characteristic, the Third Circuit found, is that it mandates that the FCC “periodically . . . justify its existing regulations.”<sup>71</sup> This “obligation” is one that the court

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<sup>66</sup>*Prometheus*, 373 F.3d at 391 (quoting *2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (¶ 16) (2003) (“*2002 Telecom Biennial Review Report*”); see *2003 Order*, 18 FCC Rcd at 13624 (¶¶10-12); see also *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 502-03 n.20 (2002) (noting the “deregulatory and competitive purposes of the [1996] Act”); *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997) (recognizing the 1996 Act’s overarching goals of “reduc[ing] regulation”).

<sup>67</sup>*Prometheus*, 373 F.3d at 391 (quoting *2002 Telecom Biennial Review Report*, 18 FCC Rcd at 4727 (¶ 5)); see *Fox Television Stations*, 280 F.3d at 1033 (Congress intended the biennial review to “continue the process of deregulation” that the 1996 Act commenced).

<sup>68</sup>*Cellco*, 357 F.3d at 98; *2002 Telecom Biennial Review Report*, 18 FCC Rcd at 4735 (¶ 21).

<sup>69</sup>*Prometheus*, 373 F.3d at 391.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

found the Commission “would not otherwise have,”<sup>72</sup> and one that “extends *beyond* [the Commission’s] normal monitoring responsibilities.”<sup>73</sup>

Now that the agency’s duty to review and update its rules is quadrennial, rather than biennial, these interpretations of the statutory mandate hold even more force. Since, under the current legislative scheme, it will be 2010 before the FCC must launch another periodic review of the ownership restrictions, the Commission’s statutory burden to ensure that its rules keep pace with the marketplace is that much stronger. The complexity of the agency’s task in this proceeding is compounded by the ever-accelerating pace of technological innovation and growth in media outlets. Based on its expertise and exercising its predictive judgment, the agency must do its best to establish a forward-looking regulatory regime that takes all of these factors into account and remains consistent with the rapidly evolving media landscape as we move into the next four years and beyond. In short, the Commission must craft rules that make sense in the 21<sup>st</sup> Century, and not cling to the still unsubstantiated fears and unproven regulatory assumptions of a bygone era.

Moreover, even if the FCC’s obligations under Section 202(h) extended no farther than those imposed on all federal agencies pursuant to the Administrative Procedure Act, the Commission still would be required to “evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission

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<sup>72</sup>*Id.*

<sup>73</sup>*Cellco*, 357 F.3d at 99 (emphasis added). Chief Judge Scirica agreed: “The significance of the mandatory review mechanism should not be ignored. This particular set of ownership rules—like any of those passed by the Commission—is not cast in iron. No single set of proposed rules can perfectly capture the dynamic nature of the media marketplace.” *Prometheus*, 373 F.3d at 438 (Scirica, C.J., dissenting). Although Chief Judge Scirica dissented from the panel opinion, the majority stated that it could “discern no real disagreement between his formulation of the standard of review and ours.” *Id.* at 395 n.20.

originally predicted they would.”<sup>74</sup> Indeed, the Supreme Court has explained that “[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”<sup>75</sup> In order to justify adoption or retention of a rule, the administrative record must demonstrate the existence of an actual problem in need of regulatory solution,<sup>76</sup> for “a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”<sup>77</sup> Likewise, Chief Judge Scirica, dissenting in *Prometheus*, noted that “[t]he dynamic evolution of the media ownership rules . . . demonstrates the virtual impossibility of drafting a single, static regulatory structure that consistently serves the public interest for an extended time period.”<sup>78</sup> These principles have special force in the case of the newspaper/broadcast ban, which the FCC admitted at the time of its creation was based only on supposition, not evidence.<sup>79</sup>

The fact that the cross-ownership rule implicates First Amendment interests similarly mandates that—whatever the appropriate constitutional standard of review—the

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<sup>74</sup>*Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

<sup>75</sup>*Am. Trucking Assocs., Inc. v. Atchison*, 387 U.S. 397, 415-16 (1967); see *NBC v. United States*, 319 U.S. 190, 225 (1943) (the Commission cannot retain a rule if “time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulation[ ]”).

<sup>76</sup>See *Burlington N. Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>77</sup>*HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

<sup>78</sup>*Prometheus*, 373 F.3d at 437 (Scirica, C.J., dissenting).

<sup>79</sup>Courts repeatedly have found that agencies relying on unsubstantiated assumptions as the foundation of their regulations have a heightened responsibility to study a rule’s impact and to eliminate it. In *Bechtel*, for example, the D.C. Circuit advised that “[t]he Commission’s necessarily wide latitude to make policy judgments based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would.” See *Bechtel*, 10 F.3d at 880.

FCC closely scrutinize whether its restrictions remain appropriately tailored means to address a genuine problem. Whether analyzed under the rational basis test (as the Commission and the Third Circuit employed) or strict scrutiny (as NAA previously has shown is appropriate because the ban discriminates only against publishers of daily newspapers),<sup>80</sup> it is clear that the absolute prohibition on newspaper/broadcast cross-ownership cannot survive scrutiny. The FCC itself recognized in the *2003 Order* that an across-the-board ban on common ownership could not be constitutionally sustained because it is not a reasonable means to accomplish the agency's public interest purposes.<sup>81</sup>

In sum, it is clear that the FCC is compelled to abandon the newspaper/broadcast cross-ownership ban to satisfy the demands of the 1996 Act, basic principles of administrative law, and overriding First Amendment imperatives. Accordingly, the Commission should move forward expeditiously to complete this proceeding and end the

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<sup>80</sup>See *NAA 2001 Comments* at Section VIII(A). The D.C. Circuit has subjected cable ownership limits to intermediate scrutiny, under which a regulation will be upheld if it advances important governmental interests and does not burden substantially more speech than necessary to further those interests. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001). In the cable context, this test applies only in the case of non-content-based regulation; content-based regulation of cable is subject to strict scrutiny. *E.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000). Although the media ownership limits previously have been held to be content neutral, the Third Circuit's emphasis on the ability of various participants in the media marketplace to provide *local* information expresses a preference for a particular type of information. *Prometheus*, 373 F.3d at 406-07. It matters not that the preference for local information does not turn on viewpoint; "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" are considered to be content-based. *Turner Broad. Co. v. FCC*, 512 U.S. 622, 642 (1994). Thus, the FCC's adoption of a justification based on the asserted ability of one form of media over another to serve local interests as support for media ownership limits in the future would necessarily take such limits outside of the realm of content neutral regulation. Because the scarcity rationale can no longer be relied upon to support application of a lesser standard of First Amendment scrutiny to broadcasting, see note 246, *infra*, this would render the media ownership limits subject to strict scrutiny, which they surely would fail.

<sup>81</sup>*2003 Order*, 18 FCC Rcd at 13,626-27 (¶ 16); see *NAA 2001 Comments* at Section VIII(B). Although the Third Circuit found that the FCC's continued imposition of *some* form of cross-ownership regulation did not violate the First Amendment, the court did not disagree with the Commission's determination that the absolute ban was constitutionally impermissible. See *Prometheus*, 373 F.3d at 401-02.

unnecessary and counterproductive regulation of newspaper/broadcast cross-ownership altogether.

**III. SINCE THE COMMISSION ISSUED ITS 2003 BIENNIAL REVIEW ORDER, THE URGENT NEED AND COMPELLING JUSTIFICATIONS FOR REGULATORY RELIEF ON NEWSPAPER/BROADCAST CROSS-OWNERSHIP HAVE BECOME EVEN MORE PRONOUNCED**

**A. The Media Marketplace Has Become Far More Diverse And Fragmented In Recent Years**

As the Commission correctly observed when it characterized the state of the media marketplace in 2003, “Americans . . . have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before.”<sup>82</sup> In contrast to the environment a generation ago, when “only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project,” consumers in 2003 could select “from hundreds of channels of video programming . . . in every market in the country and, via the Internet, [could] access virtually any information, anywhere, on any topic.”<sup>83</sup>

Since the agency made this assessment more than three years ago, technological advances in the media landscape have continued at an ever-accelerating pace. Accordingly, consumers today can, and do, choose from an even wider menu of media outlets than was the case just three years ago. This is true both in general and, more specifically, with respect to the consumption of news and information. At the same time, the increasing fragmentation of the media marketplace has continued to chip away at the

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<sup>82</sup> 2003 Order, 18 FCC Rcd at 13,623 (¶ 3).

<sup>83</sup> *Id.*

audience for traditional news media, particularly daily newspapers and broadcast outlets. The need for the Commission to level the playing field for newspaper publishers and broadcasters thus is more urgent today than ever before.

1. *The Media Marketplace Has Continued To Expand Exponentially Since 2003*

*Traditional Media:* In terms of the components of consumers' highly varied media diets, the traditional media, of course, continue to play a very important role in the dissemination of news, information, and entertainment to American households. The availability of these outlets has more or less held steady since the agency last examined the state of the marketplace.<sup>84</sup> According to the FCC's most recent report, there are now 1,747 commercial and noncommercial television stations in the United States,<sup>85</sup> a modest increase since 2003, when there were 1,730 such stations.<sup>86</sup> Likewise, there are now over 13,700 commercial and non-commercial radio stations in the U.S.,<sup>87</sup> compared to 13,450 three years ago.<sup>88</sup>

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<sup>84</sup> As the Commission has acknowledged, there has been enormous growth among these outlets since the cross-ownership ban was put in place in 1975. The number of radio stations has increased by approximately 76 percent since 1975, when a total of 7,785 radio stations were on the air. Similarly, there has been an 83.5 percent growth in the number of television stations since 1975, when there were 952 TV stations on the air. See *2001 Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17,288 (¶ 9).

<sup>85</sup> *Annual Assessment of The Status of Competition in the Market for Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2551 (¶ 94) (2006) ("*Twelfth Annual Video Competition Report*").

<sup>86</sup> Audio Division, Broadcast Station Totals as of September 30, 2003, at <http://www.fcc.gov/mb/audio/totals/bt030930.html> (last visited Oct. 20, 2006).

<sup>87</sup> *Broadcast Station Totals as of March 31, 2006*, FCC News Release, 2006 FCC LEXIS 3065 (May 26, 2006) (announcing that there are a total of 13,748 AM, FM, and non-commercial FM stations). BIA indicates that, as of August 9, 2006, there are 13,935 U.S.-licensed commercial and non-commercial radio stations, and that there are an additional 339 Canadian radio stations, and 216 Mexican radio stations, that serve United States markets, for a grand total of 14,490 radio stations available to American listeners.

<sup>88</sup> Audio Division, Broadcast Station Totals as of Sept. 30, 2003, at <http://www.fcc.gov/mb/audio/totals/bt030930.html>. (last visited Oct. 20, 2006).



In 2003, there were 1,457 daily newspapers.<sup>89</sup> Today, that number has decreased slightly to 1,452.<sup>90</sup> As of September 30, 2005, total circulation of daily newspapers was approximately 55 million,<sup>91</sup> a drop from roughly 58 million in 2003.<sup>92</sup> To counterbalance these declining circulation trends, a number of newspaper publishers have launched free local dailies over the past several years intended to complement their subscription publications and boost readership by making their news offerings more accessible to consumers.<sup>93</sup> Noteworthy examples include the Washington Post Company's *Express* (launched in the summer of 2003 in the Washington, DC area), Belo Corp's *Quick* (launched in November 2003 in the Dallas area), and Tribune Company's *amNewYork* (launched in October 2003 in the New York metropolitan area).<sup>94</sup>

This trend toward a strictly advertiser supported, rather than largely subscription based, daily newspaper model also has opened an avenue for new publishers to enter the marketplace. Notably, these entrants are providing an entirely unique voice for local news and information, free of charge, that has been enthusiastically adopted by local consumers. For example, Clarity Media Group has launched its free *Examiner* papers in

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<sup>89</sup> Newspaper Association of America, *The Source: Newspapers by the Numbers 2005*, at 19, at <http://www.naa.org/thesource/14.asp#category>, (last visited Oct. 20, 2006).

<sup>90</sup> Editor & Publisher, *International Year Book 2006*, Part 1 at ii ("2006 Editor & Publisher").

<sup>91</sup> *Id.* (based on Sunday circulation).

<sup>92</sup> Newspaper Association of America, *The Source: Newspapers by the Numbers 2005*, at 19, at <http://www.naa.org/thesource/14.asp#category> (based on Sunday circulation) (last visited Oct. 20, 2006).

<sup>93</sup> See, e.g., Lauren Gard, *Free Press Gets A Whole New Meaning*, *Bus. Week*, Jan 31, 2005, at 74.

<sup>94</sup> See, e.g., *Quick Celebrates One Year In Circulation*, Belo News Release (Nov. 11, 2004), at <http://www.belo.com/pressRelease.x2?release=20041111-610.html> (last visited Oct. 19, 2006); Kate Kaye, *New Washington Post Local Classified Site To Launch Today*, *ClickZNews* (April 24, 2006), at <http://www.clickz.com/showPage.html?page=3601196>, (last visited Oct. 20, 2006); *California and the West*; *Tribune Buys AmNewYork*, *Los Angeles Times*, Sept. 1, 2006, at C2; *TRB: Hot Stocks*, *Theflyonthewall.com* (Sept. 1, 2006).

the Baltimore, Washington, DC, and San Francisco areas, providing an independently owned and alternative daily newspaper in each of these markets.<sup>95</sup>

In addition, there are currently 6,659 weekly newspapers in the United States,<sup>96</sup> a number that has remained relatively unchanged since 2003, when there were approximately 6,700 such publications.<sup>97</sup> Likewise, total circulation of the alternative weekly press has reached approximately 56 million,<sup>98</sup> in comparison to just over 50 million in 2003.<sup>99</sup> Meanwhile, the foreign language and ethnic press are “among the few growth sectors in [traditional] journalism,”<sup>100</sup> reflecting the growing ethnic diversity across the nation. For example, the circulation of Spanish-language dailies in the United States tripled between 1990 and 2004.<sup>101</sup>

*The Internet:* The most striking changes that have occurred since 2003 have centered around the advent and utilization of alternative media and new technologies. First, even after years of staggering growth, the Internet continues to expand in a remarkably rapid fashion. The number of web pages indexed by Google is now

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<sup>95</sup> Eric Pfanner, *Europe's Papers Join the Cry of 'Read All About It, Free,'* N.Y. Times, Aug. 7, 2006, at C1.

<sup>96</sup> 2006 Editor & Publisher, Part 2 at vi.

<sup>97</sup> Newspaper Association of America, *The Source: Newspapers by the Numbers 2005*, at 21, <http://www.naa.org/thesource/14.asp#category>.

<sup>98</sup> 2006 Editor & Publisher, Part 2 at vii.

<sup>99</sup> Newspaper Association of America, *The Source: Newspapers by the Numbers 2005*, at 21, <http://www.naa.org/thesource/14.asp#category>.

<sup>100</sup> Pew Charitable Trusts, *State of the News Media 2004 Fact Sheets—Ethnic/Alternative Page* (p. 8 of 8) (Mar. 2004), at [http://www.pewtrusts.com/pdf/journalism\\_state\\_of\\_media\\_2004\\_facts.pdf](http://www.pewtrusts.com/pdf/journalism_state_of_media_2004_facts.pdf) (last visited Oct. 20, 2006) (“Pew 2004 Fact Sheets”).

<sup>101</sup> *Id.*; Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism, Audience* (2006), at [http://www.stateofthenewsmedia.org/2006/chartland.asp?id=415&ct=col&dir=&sort=&col1\\_box=1](http://www.stateofthenewsmedia.org/2006/chartland.asp?id=415&ct=col&dir=&sort=&col1_box=1) (last visited Oct. 20, 2006) (“Project for Excellence in Journalism State of the Media Study”).

estimated to have reached over 18 billion.<sup>102</sup> This staggering number has increased more than four times since early 2004 alone (when there were 4.28 billion web pages) and more than 11 times since 2000 (when there were 1.6 billion).<sup>103</sup> During 2005, roughly 137 million adult Americans used the Internet—a huge jump from just five years earlier, when the number was under 60 million.<sup>104</sup> Not surprisingly, this exponential growth is mirrored in the market valuation of some of the more successful Internet enterprises. For example, the combined enterprise value of Google and Yahoo! is now significantly more than that of the top 20 local TV, local radio, and local newspaper companies combined.<sup>105</sup> As described in detail in the next section, the Internet also unquestionably has assumed even greater prominence as a source of news and information, including at the local level, over the past several years.<sup>106</sup>

*Alternative Audio Media:* Alternative audio media also have experienced significant growth and expanded into new outlets. Satellite radio, which offers hundreds of channels of (largely commercial-free) audio programming, continues to add new programming and to experience skyrocketing growth.<sup>107</sup> The two existing satellite radio

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<sup>102</sup> See <http://www.google.com/search?q=a> (last visited Oct. 20, 2006 ).

<sup>103</sup> Google Corporate Information: Google Milestones, at <http://www.google.com/intl/en/corporate/history.html>. (last visited Oct. 20, 2006).

<sup>104</sup> Compare Pew Internet & American Life Project, *Digital Divisions* i (Oct. 5, 2005), at [http://www.pewinternet.org/pdfs/PIP\\_Digital\\_Divisions\\_Oct\\_5\\_2005.pdf](http://www.pewinternet.org/pdfs/PIP_Digital_Divisions_Oct_5_2005.pdf) (last visited Oct. 20, 2006) with Pew Internet & American Life Project, *December 2002 Tracking Survey* 4 (Jan. 10, 2003), [http://www.pewinternet.org/pdfs/PIP\\_CA\\_Health\\_Topline.pdf](http://www.pewinternet.org/pdfs/PIP_CA_Health_Topline.pdf) 1. (last visited Oct. 20, 2006).

<sup>105</sup> See Victor B. Miller IV, Bear Stearns & Co., *Radio: A Crude Recovery?*, Sept. 20, 2006, at 16 (presented at the NAB Radio Show 2006).

<sup>106</sup> See Section III.B.2, *infra*.

<sup>107</sup> See XM Satellite Radio Holdings Inc. *Announces Second Quarter 2006 Results*, XM Satellite Radio Holdings Inc. Press Release (July 27, 2006), at [http://www.xmradio.com/newsroom/screen/pr\\_2006\\_07\\_27.html](http://www.xmradio.com/newsroom/screen/pr_2006_07_27.html) (last visited Oct. 17, 2006) (reporting over 170 XM digital channels in July 2006) (“XM July 2006 Press Release”); XM Satellite Radio Holdings

services—XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio Inc.—currently have approximately 11.6 million subscribers,<sup>108</sup> a 1,351 percent increase since 2003.<sup>109</sup> Analysts predict that number will jump to 35 million by the end of 2010.<sup>110</sup>

Likewise, the top ten Internet radio sites have experienced an astounding 253 percent increase in usage in just the past three years. In 2005, the top ten sites streamed 257.3 million hours of programming per month, compared to 101.7 million hours in 2003.<sup>111</sup> When Arbitron started compiling ratings of major online radio services in

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*Inc. Announces Third Quarter 2003 Results*, XM Satellite Radio Holdings Inc. Press Release (Nov. 6, 2003), at [http://www.xmradio.com/newsroom/screen/pr\\_2003\\_11\\_06.html](http://www.xmradio.com/newsroom/screen/pr_2003_11_06.html) (last visited Oct. 17, 2006) (reporting 101 XM digital channels in November 2003); *SIRIUS Reports Strong Second Quarter 2006 Results*, Sirius Satellite Radio Press Release (Aug. 1, 2006), at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=205864&cat=&newsroom=> (last visited Oct. 17, 2006) (reporting over 125 Sirius channels in August 2006) (“*SIRIUS August 2006 Press Release*”); *SIRIUS Satellite Radio Reaches 200,000 Subscribers*, Sirius Satellite Radio Press Release (Dec. 8, 2003), at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=152380&cat=&newsroom=> (last visited Oct. 17, 2006) (reporting over 100 Sirius channels in December 2003); *The Metropolitan Opera and SIRIUS Satellite Radio to Create Historic New Radio Channel*, Sirius Satellite Radio Press Release (Sept. 20, 2006), at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=211679&cat=&newsroom=> (last visited Oct. 17, 2006); *XM Satellite Radio Expands Channel Lineup to Include More Than 170 Channels, Offering the Most Choice and the Most Channels in Satellite Radio*, XM Satellite Radio Holdings Inc. Press Release (Mar. 27, 2006), at [http://www.xmradio.com/newsroom/screen/pr\\_2006\\_03\\_27.html](http://www.xmradio.com/newsroom/screen/pr_2006_03_27.html) (last visited Oct. 17, 2006) (announcing numerous new channels, including six new regional news and talk channels bringing regional news coverage to every area of the continental U.S.).

<sup>108</sup> See *XM July 2006 Press Release* (reporting 6,899,871 subscribers); *SIRIUS August 2006 Press Release* (reporting 4,678,207 subscribers).

<sup>109</sup> *XM Satellite Radio Holdings, Inc. Announces Second Quarter 2003 Results*, XM Satellite Radio Holdings Inc. Press Release (Aug. 3, 2003), at [http://www.xmradio.com/newsroom/screen/pr\\_2003\\_08\\_07.html](http://www.xmradio.com/newsroom/screen/pr_2003_08_07.html) (last visited Sept. 11, 2006) (reporting 692,253 subscribers at end of second quarter 2003); *SIRIUS Announces Second Quarter 2003 Financial and Operating Results*, Sirius Satellite Radio Press Release (Aug. 6, 2003), at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=152756&cat=earnings&newsroom=> (last visited Sept. 11, 2006) (reporting 105,186 subscribers at end of second quarter 2003).

<sup>110</sup> William A. Meyers, Scott J. Cohen, and David A. Shapiro, *Lehman Brothers, How Much Will Satellite Radio Affect Terrestrial Radio?: Satellite Radio Represents a Material Threat*, Feb. 7, 2005, at 2.

<sup>111</sup> Accustream iMedia Research, *Accustream Research: Internet Music Radio In 4th Consecutive Year Of Expansion* (May 16, 2006), at <http://www.accustreamresearch.com/news/20060516.html> (last visited Oct. 19, 2006); Accustream iMedia Research, *Streaming Media 2003: Brand, User and Audience Share Analysis* (Feb. 18, 2004), at <http://www.accustreamresearch.com/products/streamingmedia2003.html> (last visited Oct. 18, 2006).

October 2004, it measured three services (Yahoo! Launchcast, AOL Radio Network, and MSN Radio) and found that 4.1 million people listened to those networks each week.<sup>112</sup>

A year and a half later, in April 2006, Arbitron had expanded its measurements to six networks (adding ESPN Radio, Live365, and Clear Channel Online) and the number of people listening to those networks each week had increased 85 percent, to 7.5 million.<sup>113</sup>

One in five adults between the ages of 18 and 34 now listens to Internet radio each week, and weekly Internet radio audiences increased by 50 percent between January 2005 and January 2006 alone.<sup>114</sup>

In addition, podcasting, a relatively new audio download system that did not even have a name until 2004, has further enhanced the flexibility of consumers to access entertainment, news, and information on their own schedules and at any given location. Over six percent of online users, or 9.2 million people, have downloaded a podcast.<sup>115</sup> And, according to a recent Nielsen/NetRatings study, podcasting “appears to be a boon for news.”<sup>116</sup> For example, podcasts from National Public Radio are now regularly

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<sup>112</sup> Arbitron, Inc., *4.1 Million People a Week Listen to Three Major Online Radio Networks According to comScore Arbitron Online Radio Ratings* (Dec. 6, 2004), at <http://www.comscore.com/press/release.asp?press=525> (last visited Oct. 27, 2006).

<sup>113</sup> Arbitron, Inc., *Persons 12+, Average Weekly Audience* (April 2006), at [http://www.arbitron.com/onlineradio/apr\\_ratings\\_2006.htm](http://www.arbitron.com/onlineradio/apr_ratings_2006.htm) (last visited Sept. 14, 2006).

<sup>114</sup> See Edison Media Research, *Digital Platforms Extend Radio Beyond AM/FM Dial* (Apr. 13, 2006), at [http://www.edisonresearch.com/home/archives/2006/04/digital\\_platfor.php](http://www.edisonresearch.com/home/archives/2006/04/digital_platfor.php) (last visited Oct. 18, 2006); Arbitron Inc., Edison Media Research, *Internet and Multimedia 2006: On-Demand Media Explodes 26* (2006), at <http://www.arbitron.com/downloads/im2006pres.pdf>. (last visited Oct. 20, 2006).

<sup>115</sup> NetRatings, Inc., *Podcasting Gains An Important Foothold Among U.S. Adult Online Population, According To Nielsen/NetRatings* (Jul. 12, 2006), at [http://netratings.com/pr/pr\\_060712.pdf](http://netratings.com/pr/pr_060712.pdf) (last visited Oct. 17, 2006) (“July 12, 2006 Nielsen/Net Ratings for Podcasting”).

<sup>116</sup> *Id.* “Podcasting” is the preparation and distribution of audio (and possibly other media) files for download to digital music or multimedia players, such as the iPod. A podcast can be easily created from a digital audio file. The podcaster first saves the file as an MP3 (a standard technology and format for compressing a sound sequence into a very small file) and then uploads it to the website of a service

making the iTunes Top 100 list.<sup>117</sup> In the past year, all three broadcast network news operations have introduced podcasts,<sup>118</sup> and many daily newspapers and local television news operators are following suit.<sup>119</sup>

*Alternative Video Media:* On the video front, subscription video services continue to expand at an impressive pace. Overall, approximately 94.2 million households, or almost 86 percent of the TV households nationwide, subscribed to one of the growing number of MVPD services as of June 2005.<sup>120</sup> In its *2003 Order*, the Commission reported that there were 308 satellite-delivered national non-broadcast television networks available for carriage over cable, direct broadcast satellite (“DBS”), and other multichannel video program distribution (“MVPD”) systems.<sup>121</sup> In addition, it found that there were 84 regional programming networks in 2003, 37 (or 44 percent) of which were

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provider. See Podcasting Terms: Glossary, at [http://whatis.techtarget.com/definition/0,,sid9\\_gci1189222,00.html](http://whatis.techtarget.com/definition/0,,sid9_gci1189222,00.html) (last visited Sept. 20, 2006).

<sup>117</sup> July 12, 2006 Nielsen/Net Ratings for Podcasting.

<sup>118</sup> “Podcasts on MSNBC.com” at <http://www.msnbc.msn.com/id/8132577> (last visited Oct. 17, 2006); “ABC News Podcasting” at <http://abcnews.go.com/Technology/Podcasting/> (last visited Oct. 17, 2006); “CBS News” at <http://www.cbsnews.com/stories/2005/07/06/utility/main706903.shtml> (last visited Oct. 17, 2006).

<sup>119</sup> See, e.g., Colin Mulvany, Video Journal, SpokesmanReview.com (Spokane, WA), at <http://www.spokesmanreview.com/blogs/video/> (last visited Sept. 25, 2006); DenverPost.com Podcasts, at <http://www.denverpost.com/podcasts> (last visited Sept. 25, 2006); Fox23News.com Podcasts & RSS News Feeds, WXAA-TV (Albany, NY), at <http://www.fox23news.com/news/podcast/> (last visited Sept. 25, 2006); Channel 9 News Podcasts, WCPO.com (Cincinnati, OH) at <http://www.wcpo.com/video/podcast/> (last visited Sept. 25, 2006); WFHB News & Public Affairs Podcasts (Bloomington, IN), at <http://news.wfhb.org/> (last visited Sept. 25, 2006); KCTS Connects Podcast (Seattle, WA), at <http://www.kcts.org/productions/kctsconnects/podcast/index.asp> (last visited Sept. 25, 2006); Post-Bulletin News Podcast, Post-Bulletin.com (Rochester, MN), at <http://news.postbulletin.com/podcast/> (last visited Sept. 25, 2006); Multimedia Projects, ThePilot.com (Southern Pines, NC), at <http://www.thepilot.com/multimedia/> (last visited Sept. 25, 2006); Podcast Updates, WTOPnews.com (Washington, DC), at <http://www.wtopnews.com/?nid=524&sid=611200> (last visited Sept. 25, 2006).

<sup>120</sup> *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2506 (¶ 8).

<sup>121</sup> *2003 Order*, 18 FCC Rcd at 13,665 (¶ 123).

regional news networks.<sup>122</sup> These already huge numbers have continued to increase steadily. In 2005, the Commission identified 531 satellite-delivered national programming networks, an increase of 143 networks over the 2004 total of 388 networks.<sup>123</sup> The agency also identified 96 regional networks in 2005, 45 (or 46.9 percent) of which were regional news networks.<sup>124</sup> This represents a 17 percent increase in the number of regional news networks since the agency considered the issue in 2003.<sup>125</sup>

Even more impressively, the advent of video-on-demand (“VOD”) services has vastly increased consumers’ ability to consume entertainment, as well as news and information, according to their own needs and schedules. Over the past several years,

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<sup>122</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606, 1701 (¶ 161) (2004). The Commission further concluded in its *2003 Order* that “roughly one-third of cable subscribers, 22.3 million, had access to a local or regional news channel in July 2002.” *2003 Order*, 18 FCC Rcd at 13,783, n. 921.

<sup>123</sup> *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2575 (¶ 157). The Commission attributes this significant one-year increase to several factors. First, the agency updated its prior estimates based on additional data sources. In addition, the agency investigated comments that noted errors or omissions from the Eleventh Annual Video Competition Report. Most importantly, however, it identified many new networks since the last report, most notably new, non-English and multicultural programming services. *Id.* at 2575-76 (¶ 158).

<sup>124</sup> *Id.* at 2587 (¶ 185).

<sup>125</sup> Because of flaws in the survey that the agency used as a source in creating the Diversity Index, the FCC determined in its *2003 Order* not to include cable as a source of local news in the Index. In doing so, however, the Commission recognized that “cable systems do provide local news and current affairs information....” *2003 Order*, 18 FCC Rcd at 13,782 (¶ 408). In particular, the decision expressly acknowledges that “cable. . . is becoming a more important source of local news and information” due to the facts that “[s]ome markets do have commercial local news channels on cable,” at least one national cable news service provides five-minute local “cut-ins” every half hour in some markets, and that local public, educational, and governmental (“PEG”) channels provide local news and information. *See id.* at 13,783 (¶ 413). Because the agency did not “have reliable data on this point,” the agency opted to “exclude cable from the [Diversity Index in order] to simplify [its] general analysis.” *Id.* Acknowledging the incompleteness of its analysis on this issue, the FCC also committed to “review this issue in the next biennial review,” when it would have the ability to conduct a “more accurate survey data on consumers’ use of cable for local news and current affairs.” *Id.* at 13,782, n.917. For all of these reasons, NAA submits that, however the agency opts to conduct its diversity analysis in this proceeding, cable must be included in the calculus in order for the FCC to accurately capture the full array of local news and information options now available to local consumers.



cable operators have amassed enormous libraries of VOD programming.<sup>126</sup> Through the use of VOD, consumers have the ability to view the programming of their choice at any time of day, and to fast-forward, rewind, and pause the programs as they watch.<sup>127</sup>

To provide a competitive alternative to traditional cable and satellite subscription services, several major local exchange carriers (“LECs”) have been working over the past several years to provide their own brand of multichannel video services. Among the noteworthy new entrants are Verizon and AT&T. Verizon is building out its fiber-optic “FiOS” system and pursuing local cable franchises to offer its FiOS TV service in 15 states. At the end of the first quarter of 2006, the company had secured franchises covering 1 million households in nine states and had begun selling FiOS TV in select markets in seven of those states.<sup>128</sup> AT&T (which recently merged with SBC) is building

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<sup>126</sup> *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2529 (¶ 57) (noting, for example, that Comcast’s VOD service, which is available to 87 percent of Comcast subscribers, allows digital cable subscribers to choose from a menu of more than 3,500 programs, at any given time, with most of the programs available free of charge); *see also id.*, at 2528-29 (¶ 56). At year-end 2004, VOD service was available to 73 percent of homes passed by cable systems. *Id.*

<sup>127</sup> In an increasing number of markets, cable operators are offering local news through VOD services. For example, in Los Angeles, Time Warner is offering VOD newscasts from KNBC; Buckeye Cable offers its Toledo subscribers VOD news from NBC affiliate WNWO; Comcast Cable provides VOD news to its subscribers in Philadelphia, Baltimore, Minneapolis, Boston, San Francisco, Denver, and Salt Lake City. *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2587 (¶ 185).

Digital video recorders (“DVR”) are yet another important component of today’s increasingly on-demand media universe. DVRs allow subscribers to record programs onto a hard drive located in a set-top box, which can then be played back at any time. DVR features include fast-forward, rewind, and the ability to pause live television. While early units were marketed independently, cable and satellite operators are now integrating DVR functionality into their digital set-top boxes. At the end of 2004, DVR service was available to 79 percent of the homes passed by cable systems and there were 1.8 million subscribers equipped with integrated DVRs. Many cable and satellite operators use dual-tuner DVRs which enable subscribers to record one or more programs while watching another program. *Id.* at 2530 (¶ 58).

<sup>128</sup> *See Verizon Video Franchises Cover 1M Households*, FierceIPTV: The IPTV Weekly Monitor (May 4, 2006), at <http://www.fierceiptv.com/story/verizon-video-franchises-cover-1m-households/2006-05-04> (last visited Oct. 17, 2006).



its own network of fiber-optic facilities in connection with its AT&T U-verse TV service. The company anticipates reaching nearly 19 million households by the end of 2008.<sup>129</sup>

A broad and ever-growing array of alternative delivery methods for video content also have come on the scene in recent years. These services, all of which were either non-existent or in nascent stages of development in 2003, range from video content streamed from websites or downloaded from the Internet (so-called “video podcasting”) to live online TV programming to mobile TV content available on wireless phones.<sup>130</sup> The most widely used alternative in this line of services is downloading or streaming video clips. According to a recent poll conducted by the Associated Press and AOL, more than half of all U.S. Internet users have watched or downloaded video.<sup>131</sup> News clips were reportedly the most popular type of content downloaded, attracting 72 percent of online video viewers.<sup>132</sup> In the month of July 2006 alone, 107 million Americans streamed or downloaded nearly 7.2 billion videos.<sup>133</sup>

Among the most trafficked of these services are those offering free user-posted (and often user-created) video content. For example, YouTube reportedly is now the

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<sup>129</sup> See AT&T U-verse TV to Include Video-On-Demand Programming from ViewNow, *tvoever.net* (Sept. 6, 2006), at <http://www.tvoever.net/ATT+Uverse+TV+To+Include+VideoOnDemand+Programming+From+ViewNow.aspx> (last visited Oct. 17, 2006).

<sup>130</sup> See Jerri Stroud, *Video to Go*, St. Louis Post-Dispatch, Sept. 8, 2006, at <http://www.stltoday.com/stltoday/business/stories.nsf/0/BDCDEF570126751F862571E3000D441B?OpenDocument> (last visited Oct. 17, 2006) (“Stroud Video to Go Article”).

<sup>131</sup> See Associated Press, *Poll: Online Viewers Shun Lengthy Videos*, at <http://www.msnbc.msn.com/id/14678028/> (last visited Oct. 5, 2006).

<sup>132</sup> *Id.*

<sup>133</sup> Study: 107M Viewed Online Video in July, MSN Money, Sept. 27, 2006, at <http://news.moneycentral.msn.com/provider/providerarticle.asp?feed=AP&Date=20060927&ID=6059472>. (last visited Oct. 17, 2006).

tenth most popular website in terms of Internet traffic.<sup>134</sup> As of June 2006, YouTube users were watching over 100 million videos per day.<sup>135</sup> While much of the content posted on YouTube is entertainment oriented, the site also is becoming an important destination for political news and information. In the run up to the November elections, for example, a growing number of congressional candidates—particularly those that are low on funding—have been turning to YouTube to reach out to voters.<sup>136</sup> Indeed, the upcoming midterm elections have been dubbed the first “YouTube elections.”<sup>137</sup>

Not to be left out, several television networks—including ABC, CBS, and NBC—are offering some of their shows online for free viewing via download or streaming.<sup>138</sup> Similarly, News Corp.’s FOX On Demand service is making its television shows and

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<sup>134</sup> Internet Traffic Report: YouTube, Alexa.com, at [http://www.alexa.com/data/details/traffic\\_details?url=www.youtube.com](http://www.alexa.com/data/details/traffic_details?url=www.youtube.com) (last visited Oct. 3., 2006). YouTube also is currently the fastest-growing website on the Internet and saw its traffic grow 297 percent in the first six months of 2006. NetRatings, Inc., *YouTube U.S. Web Traffic Grows 75 Percent Week Over Week, According To Nielsen/NetRatings* (Jul. 21, 2006), at [http://www.nielsen-netratings.com/pr/pr\\_060721\\_2.pdf](http://www.nielsen-netratings.com/pr/pr_060721_2.pdf) (last visited Oct. 17, 2006).

<sup>135</sup> *YouTube Serves Up 100 Million Videos A Day Online*, USA Today, July 17, 2006, at [http://www.usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm](http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm)? (last visited Oct. 17, 2006).

<sup>136</sup> See Jon Ward, *Mfume Talks To Voters Via YouTube*, The Washington Times, Aug. 31, 2006, at B2. For example, as *The Washington Times* recently reported, “U.S. Senate candidate Kweisi Mfume, whose underfunded campaign has yet to run a TV commercial with less than two weeks until the Democratic primary, is using Internet video site YouTube to reach out to voters, a strategy that Web analysts say is the wave of the future in politics.” *Id.*

<sup>137</sup> See Lee Gomes, *Like Google And TiVo, YouTube Is Now A Verb, And An Adjective*, W. St. J., Oct. 18, 2006, at B1.

<sup>138</sup> Douglas Durden, *Miss Your Favorite Show? Check Online*, Richmond Times-Dispatch, Sept. 22, 2006, at [http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD\\_BasicArticle&c=MGArticle&cid=1149190776472](http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD_BasicArticle&c=MGArticle&cid=1149190776472) (last visited Oct. 17, 2006) For a comprehensive listing of television shows made available online by their respective networks as of Oct. 1, 2006, see *Where to find your favorite shows online*, TVSquad Blog, at <http://www.tvsquad.com/2006/10/01/where-to-find-your-favorite-shows-online/> (last visited Oct. 17, 2006).

films available for online viewing on a variety of different online platforms, some of which are offered free of charge.<sup>139</sup>

As downloadable video has grown in appeal, so has the willingness of consumers to pay for this type of content. Among the fee-based download services are Apple's iTunes, which offers a wide array of video content, including TV programs and movies. As of June 2006, iTunes had sold over 30 million videos, and was continuing to sell videos at a rate of one million per week.<sup>140</sup> Other competitors include MovieLink, Guba, CinemaNow, Vongo, and Amazon.com's new Unbox service; the popular peer-to-peer distribution program BitTorrent is expected to enter the field in January.<sup>141</sup>

Live and on-demand video on third-generation ("3G") mobile phones and other mobile wireless devices, also known as mobile TV, is another delivery method for video

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<sup>139</sup> *Fox Offers shows on MySpace, TV Sites*, Boston Globe, Oct. 3, 2006, at [http://www.boston.com/business/technology/articles/2006/10/03/fox\\_offers\\_shows\\_on\\_myspace\\_tv\\_sites/](http://www.boston.com/business/technology/articles/2006/10/03/fox_offers_shows_on_myspace_tv_sites/) (last visited Oct. 17, 2006); Greg Sandoval, *Fox to Offer TV Downloads on MySpace*, CNET News.com, Aug. 14, 2006, at [http://news.com.com/Fox+to+offer+TV+downloads+on+MySpace/2100-1025\\_3-6105025.html](http://news.com.com/Fox+to+offer+TV+downloads+on+MySpace/2100-1025_3-6105025.html) (last visited Oct. 17, 2006). In a related online programming niche, AOL provides classic Time Warner television shows for online viewing on its IN2TV website. Walt Belcher, *AOL's In2TV Brings Back The Classics, Including Some 'Our Gang' Episodes*, Tampa Tribune, Sept. 11, 2006, at <http://www.tbo.com/entertainment/tv/MGBHB5Q3YRE.html> (last visited Oct. 17, 2006).

<sup>140</sup> Bruce Meyerson, *AT&T To launch Internet TV Service*, MSNBC.com, Sept. 12, 2006, at <http://www.msnbc.msn.com/id/14800062/> (last visited Oct. 17, 2006).

<sup>141</sup> Ellen Lee, *Coming Soon To Your Screen*, San Fran. Chron, Sept. 18, 2006, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/18/BUGE9L5K1K1.DTL> (last visited Oct. 17, 2006); *Amazon.com Unwraps Its 'Unbox,'* CNET News.com, Sept. 7, 2006, at [http://news.com.com/Amazon.com+unwraps+its+Unbox/2100-1026\\_3-6113478.html](http://news.com.com/Amazon.com+unwraps+its+Unbox/2100-1026_3-6113478.html) (last visited Oct. 17, 2006).

Recently, Apple has announced a complementary product, iTV, that will enable users to play such videos on their home televisions rather than just computer screens and iPods. Nick Wingfield & Merissa Marr, *Apple Computer Aims to Take Over Your Living-Room TV*, Wall St. J., Sept. 13, 2006, at B1. Sony is considering a similar technology that would allow consumers to download Sony movies directly to their Sony's HDTV sets. Ellen Sheng, *As Internet TV Gains Popularity, Cable Firms Bulk Up Offerings*, Wall St. J., Sept. 28, 2006 at B4.

content being adopted by consumers at a rapid pace.<sup>142</sup> The U.S. mobile TV audience grew by 45 percent to 3.7 million subscribers in the second quarter of 2006 alone.<sup>143</sup> Several major wireless carriers have created their own video subscription services. For example, Sprint TV offers live TV channels, and the Verizon VCAST service makes available a variety of short videos.<sup>144</sup> There also are an array of niche mobile providers that specialize in providing video content, such as Amp'd Mobile, which broadcasts live sporting events and television programming targeted to the 18-35 year-old demographic.<sup>145</sup> Other video content providers, such as GoTV and MobiTV, provide similar licensed mobile TV services.<sup>146</sup>

Yet another emerging option for consumers is TV over IP (not to be confused with IPTV): viewing live TV content on a personal computer over a broadband Internet

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<sup>142</sup> See Stroud Video to Go Article, at <http://www.stltoday.com/stltoday/business/stories.nsf/0/BDCDEF570126751F862571E3000D441B?OpenDocument>.

<sup>143</sup> Paul Taylor, *AT&T to Launch Web TV Service*, Financial Times (London), Sept. 12, 2006, at <http://www.ft.com/cms/s/647b2590-41ec-11db-b4ab-0000779e2340.html> (last visited Oct. 17, 2006) (“Taylor AT&T Article”).

<sup>144</sup> See Stroud Video to Go Article, at <http://www.stltoday.com/stltoday/business/stories.nsf/0/BDCDEF570126751F862571E3000D441B?OpenDocument>; Review, *Sprint TV*, PC Magazine, June 8, 2006, at <http://www.pcmag.com/article2/0,1895,1974128,00.asp> (last visited Oct. 17, 2006); *Coming To Your Cell Phone: Movies from Sprint*, Balt. Bus. Journal, Sept. 8, 2006, at <http://baltimore.bizjournals.com/baltimore/stories/2006/09/04/daily27.html?surround=1fn> (last visited Oct. 17, 2006); Wayne Friedman, ‘Lost’ In Transition: Disney To Produce Mini, Mobile Episodes, MediaDailyNews, Nov. 18, 2005, at <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=36483&Nid=16690&p=33186> (last visited Oct. 17, 2006).

<sup>145</sup> *Amp'd Mobile Introduces World's Most Extensive Mobile Programming Experience for 18 to 35 Year Olds*, Amp'd Mobile Press Release (Sept. 13, 2006), at [http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news\\_view&newsId=20060913005421&newsLang=en](http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20060913005421&newsLang=en) (last visited Oct. 17, 2006).

<sup>146</sup> Olga Kharif, *Online Video: Next Stop, Nasdaq?*, Bus. Week, Sept. 27, 2006, at [http://www.businessweek.com/technology/content/sep2006/tc20060927\\_385661.htm?chan=technology\\_techhnology+index+page\\_today's+top+stories](http://www.businessweek.com/technology/content/sep2006/tc20060927_385661.htm?chan=technology_techhnology+index+page_today's+top+stories) (last visited Oct. 17, 2006).

connection. AT&T recently unveiled plans to offer AT&T Broadband TV, a service offering consumers 20 channels of full-screen, live digital television content, such as Fox News and the History Channel, on personal computers via a broadband Internet connection.<sup>147</sup> For consumers seeking international content, JumpTV offers 220+ channels from over 65 countries via its subscription-based Internet service.<sup>148</sup>

2. *Today's Consumers Get News And Information From A Broad Mix Of Media According To Their Individual Needs And Interests*

Each of the developments described above has helped to empower consumers to develop highly tailored media consumption habits from a wide array of choices based on their individualized needs, interests, and schedules at any given time. As one study of recent changes in media consumption behavior recently concluded, “[t]he world of centralized, one-way and scheduled media is fading fast. Consumers want media on their own terms and technology has empowered them to do that.”<sup>149</sup>

As explained in the study, which was conducted jointly by the NAA, the Association of Newspaper Editors, the Donald Reynolds Institute at the University of Missouri School of Journalism, and Kannon Consulting (“NAA/ASNE Media Usage Study”), several broad technological trends have converged to enable consumers to create highly individualized media packages. First, “[h]igh-speed networks at home, at work

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<sup>147</sup> Taylor AT&T Article, at <http://www.ft.com/cms/s/647b2590-41ec-11db-b4ab-0000779e2340.html>; Bruce Meyerson, *AT&T to Launch Internet TV Service*, MSNBC.com, Sept. 12, 2006, at <http://www.msnbc.msn.com/id/14800062/> (last visited Oct. 17, 2006).

<sup>148</sup> *JumpTV Signs Strategic Partnership With Maktoob.com—One of the Arab World's Largest Internet Portals*, JumpTV Press Release (Oct. 3, 2006), at [http://www.marketwire.com/mw/release\\_html\\_b1?release\\_id=168699](http://www.marketwire.com/mw/release_html_b1?release_id=168699) (last visited Oct. 17, 2006).

<sup>149</sup> American Society of Newspaper Editors and Newspaper Association of America, *Growing Audience: Understanding the Media Landscape: Executive Summary* at 6 (2006), at <http://www.growingaudience.com/downloads/GALandscapeExecSummary.pdf> (last visited Oct. 18, 2006) (“ASNE/NAA Media Usage Study”).

and at the corner Starbucks allow consumers to be connected virtually anywhere.”<sup>150</sup>

Second, “[d]igital media has eliminated barriers to entry so that consumers can now fin[d] information most relevant to them from an array of sources—both professional journalists and ‘average Joes’ who share a passion for a topic.”<sup>151</sup> Third, “sophisticated search technologies and new storage devices allow consumers to pluck out the stories, TV shows and music from their original packages and re-assemble them at the user’s convenience.”<sup>152</sup> Overall, the study concludes, “[t]he digitization of content, availability of low-cost publishing tools, cheap computer and hosting solutions, proliferation of media choices and devices, and the ubiquity of wired and wireless networks is transforming the media landscape.”<sup>153</sup>

Based on these technological innovations, consumers now can now select from a long list of choices in compiling their own personalized media packages. According to a 2005 study conducted by Ball State University, over a dozen different types of media outlets are vying for, and receiving, consumers’ attention during the typical media day (which now spans over nine hours, on average).<sup>154</sup> As a result, not only are consumers making use of a wide variety of media, they are increasingly using multiple media

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<sup>150</sup> *Id.* at 6.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 3.

<sup>154</sup> Center for Media Design, Ball State University, *Middletown Media Studies: The Media Day* at 12, 14 (Fall 2005) (“*Ball State Media Day Study*”). The media examined in the study include: (1) television; (2) radio; (3) the Internet; (4) land line phones; (5) mobile phones; (6) music (other than on the radio); (7) newspapers; (8) magazines; (9) books; (10) VCRs; (11) DVDs; (12) game consoles; and (13) other media. *Id.* at 14. While some of these media may not be specifically relevant to the issues involved in the instant proceeding, the study gives a broad sense of the wide diversity of outlets now vying for consumer attention.

simultaneously.<sup>155</sup> According to another recent Ball State University study of the trend toward so-called “concurrent media exposure,” consumers now spend nearly one-third of their media day using at least two media at the same time.<sup>156</sup> Indeed, the study found that usage of three or more media at any given time was “not unusual.”<sup>157</sup> Moreover, nearly all (96 percent) of the study’s approximately 400 participants were found to have engaged in at least one instance of “concurrent media exposure.”<sup>158</sup> Thus, the study concludes, consumers are adapting to the ever-increasing array of content sources available to them through several overlapping behaviors, including substituting new media for old, increasing the amount of time devoted to media overall, and using more than one medium at a time.<sup>159</sup>

Given the broad array of media and technological innovations now competing for consumers’ attention, it is not surprising that news consumption habits, in particular, have become incredibly fragmented in recent years. Long gone are the days when consumers were required to watch the evening news at a predetermined time or await the arrival of their daily newspaper in order to be apprised of the news events of the day. In a recent analysis of the daily news choices of average Americans, the Project for Excellence in Journalism evaluated “a broad swath of what Americans can choose from” for news and information, including national newspapers, cable news channels, major commercial

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<sup>155</sup> See generally Center for Media Design, Ball State University, *Middletown Media Studies: Concurrent Media Exposure* (Fall 2005) (“*Ball State Concurrent Media Exposure Study*”).

<sup>156</sup> *Id.* at 16.

<sup>157</sup> *Id.* at 17.

<sup>158</sup> *Id.* at 16.

<sup>159</sup> *Id.* at 8. In describing these trends, the study notes that overall daily use of media has increased by 30 minutes since 1999. *Id.* (citing Veronis Suhler Stevenson (2005)).

broadcast networks, websites, blogs, radio, local newspapers, magazines, and ethnic and alternative media.<sup>160</sup>

The study found that the topics covered, as well as the scope and depth of news coverage, varied greatly among these outlets.<sup>161</sup> Because “none” of the media examined in the study “excel at everything,” in the current environment, “few, if any, news consumers . . . rely on only one of these outlets anymore.”<sup>162</sup> Rather, “[a]s the media fragments, nowadays, consumers must choose strategically to get a complete diet. The notion of relying on a single or primary source for news—one-stop shopping—may no longer make sense.”<sup>163</sup> Moreover, as the NAA/ASNE Media Usage Study concluded, “[t]he busy lifestyles of most American adults, along with multiple on-demand news sources, means that people typically fit news into their schedules in a variety of ways, from consuming news at regularly appointed times to getting a ‘news fix’ occasionally as their schedules permit.”<sup>164</sup> Similarly, the author of a recent study of the news consumption habits of teen-agers concluded that today’s youth rely on “a patchwork quilt of sources.”<sup>165</sup>

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<sup>160</sup> *Project for Excellence in Journalism State of the Media Study*, at [http://stateofthenewsmedia.org/2006/printable\\_daymedia\\_chapter.asp?media=1&cat=1](http://stateofthenewsmedia.org/2006/printable_daymedia_chapter.asp?media=1&cat=1).

<sup>161</sup> *Id.* at 1-2.

<sup>162</sup> *Id.* at 8.

<sup>163</sup> *Id.* at 2. The American Society of Newspaper Editors, along with NAA, also observed that “[c]onsumers of news and information are increasingly becoming ‘news grazers,’ sampling a veritable media buffet throughout the day.” *ASNE/NAA Media Usage Study* at 4.

<sup>164</sup> *ASNE/NAA Media Usage Study* at 4.

<sup>165</sup> Tracey Wong Briggs, *Teens Turn to TV, Internet for News*, USA Today, Sept. 22, 2006, at 2B, at [http://www.usatoday.com/tech/news/2006-09-22-hs-media-usat\\_x.htm](http://www.usatoday.com/tech/news/2006-09-22-hs-media-usat_x.htm) (last visited Oct. 17, 2006) (quoting David Yalof, author of a 2006 Future of the First Amendment study).



Further complicating the mix of media from which consumers now obtain news and information is the element of interactivity made possible by the Internet. In today's marketplace, consumers no longer have to be passive recipients of information from a small handful of established media outlets. Rather, citizens now have the ability to contribute directly to online discussions on virtually any topic imaginable or even to create, at minimal cost, their own media outlets. Accordingly, the seemingly limitless capacity of the Internet has transformed the traditional character of the marketplace for news and information and, consequently, has made it possible for any individual to choose his own mix of news and information sources and, if desired, to contribute personal knowledge and views to the available mix of opinions or information on any newsworthy subject.

3. *As A Result Of The Proliferation Of News Outlets Available To Local Consumers, Daily Newspaper And Broadcast Outlets Today Face Increasing Competitive Challenges*

A natural corollary of the increasing fragmentation in the news and information marketplace has been a decline in the prominence and economic performance of local daily newspapers and broadcast outlets. As has been widely reported in the press recently, competition from the Internet and other alternative media has taken a considerable toll on the newspaper industry. While newspaper circulation has been declining at a rate of one percent each year since 1990,<sup>166</sup> these losses accelerated in 2005. Circulation went down 2.6 percent for daily newspapers and 3.1 percent for Sunday newspapers.<sup>167</sup> No improvement is expected in 2006.

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<sup>166</sup> *Pew 2004 Fact Sheets—Newspaper Page* (p. 1 of 8), at [http://www.pewtrusts.com/pdf/journalism\\_state\\_of\\_media\\_2004\\_facts.pdf](http://www.pewtrusts.com/pdf/journalism_state_of_media_2004_facts.pdf) (last visited Oct. 17, 2006)

<sup>167</sup> *Project for Excellence in Journalism State of the Media Study*, at [http://www.stateofthenewsmedia.org/2006/narrative\\_newspapers\\_intro.asp?media=3](http://www.stateofthenewsmedia.org/2006/narrative_newspapers_intro.asp?media=3).

Advertising revenue—which accounts for 75 to 80 percent of average newspaper earnings—also has taken a substantial hit.<sup>168</sup> With circulation dropping and new media providing increasingly attractive advertising alternatives, as one newspaper industry executive recently stated, “advertising revenue growth has basically come to a halt.”<sup>169</sup> For example, total U.S. spending on advertising increased by 91 percent between 1993 and 2004; in comparison, spending on newspaper advertising grew by approximately half as much (46.5 percent) during that period.<sup>170</sup> Since 1990, the newspaper industry’s share of the advertising market has fallen every year.<sup>171</sup> In the first three quarters of 2006, moreover, spending on newspaper print advertising increased by a modest 0.3 percent over the corresponding period in 2005, while spending for online advertising advanced by 35 percent.<sup>172</sup>

Investors and analysts have viewed newspaper performance with an increasingly critical eye in recent years. In 2005, newspaper stocks fell an average of 20 percent.<sup>173</sup> In the face of declining quarterly earnings, analysts have been lowering their revenue

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<sup>168</sup> Julie Bosman, *Online Newspaper Ads Gaining Ground on Print*, N.Y. Times, June 6, 2006, at C1, at <http://select.nytimes.com/search/restricted/article?res=F30813FD3F550C758CDDAF0894DE404482> (last visited Oct. 17, 2006) (“*Bosman Newspaper Ads Article*”).

<sup>169</sup> James Hopson (Operating Vice President of Lee Enterprises), *The Answer Is: Nobody Knows*, The American Society of Newspaper Publishers at 9 (May 2006 – July 2006).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* While the online advertising segments of newspapers generally are growing at a much faster pace, online advertising revenue accounts for only approximately 6.5 percent of newspapers’ total advertising revenue. See *Bosman Newspaper Ads Article*.

<sup>172</sup> See *Bosman Newspaper Ads Article*. See also *Internet Advertising Revenues Close to \$4 Billion for Q1 2006, Continues Trend of Record Setting Quarters*, Internet Advertising Bureau Press Release (May 30, 2006), at [http://www.iab.net/news/pr\\_2006\\_05\\_30.asp](http://www.iab.net/news/pr_2006_05_30.asp) (reporting 38 percent increase in Internet advertising revenues in first quarter of 2006 over first quarter in 2005) (last visited Oct. 17, 2006).

<sup>173</sup> Christopher Rowland, *Despite Debt, Chain Seeks More Papers*, Aug. 1, 2006, Boston Globe, at E1.

predictions for the newspaper industry for both this year and next.<sup>174</sup> At an individual level, this skepticism has been underscored by the recent forced sale of America's second largest newspaper chain, Knight Ridder. Faced with declining profits and circulation, the Tribune Company similarly has been embroiled in a very contentious and public struggle with key shareholders over the future of the company.<sup>175</sup> Even the *New York Times*, the "Gray Lady," has not been immune to these trends. Its share price has fallen by nearly 40 percent in the past three years.<sup>176</sup>

Traditional broadcast media also have experienced notable downward trends. The three nightly newscasts on network television have seen Nielsen ratings decline by 34 percent in the last decade.<sup>177</sup> Although local television stations generally have remained profitable, viewership has declined in recent years.<sup>178</sup> The number of hours the average person spends watching broadcast television on an annual basis declined by 15 percent in the past decade (while the number of hours spent watching cable and satellite television increased by 35 percent).<sup>179</sup> As of 2004, viewership of local early evening newscasts and

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<sup>174</sup> See Associated Press, *Newspaper Publishers Likely to Struggle in 3rd Quarter on Weak Ad Sales Results*, Oct. 6, 2006.

<sup>175</sup> See, e.g., Michael Oneal, *Weaker Earnings Keep Heat on Tribune*, Chicago Tribune, July 14, 2006, at C1; Frank Ahrens, *Tribune Empire Could Crumble*, The Washington Post, Sept. 26, 2006, at D1.

<sup>176</sup> Compare The New York Times Company, 2002 Annual Report F-51 (2003) (reporting fourth quarter 2002 share price of \$50.11) with The New York Times Company, 2005 Annual Report F-61 (2006) (reporting fourth quarter 2005 share price of \$30.17).

<sup>177</sup> Pew 2004 Fact Sheets—Network TV Page (p. 2 of 8) at [http://www.pewtrusts.com/pdf/journalism\\_state\\_of\\_media\\_2004\\_facts.pdf](http://www.pewtrusts.com/pdf/journalism_state_of_media_2004_facts.pdf) (last visited Oct. 17, 2006).

<sup>178</sup> The New York Times Company also recently announced the sale of its nine television stations. See Katharine Q. Seelye, *Times Company Puts Its Nine Television Stations Up for Sale*, N.Y. Times, Sept. 13, 2006. Industry observers have noted that the sale "suggest[s] a concern about the future profitability of local stations during a tumultuous time for media companies, as the Internet siphons consumers and advertisers from both print and television." *Id.*

<sup>179</sup> ASNE/NAA *Media Usage Study* at 3.

late newscasts had dropped by 18 percent and 16 percent, respectively, since 1997.<sup>180</sup>

While the audience for radio has been steady, fewer than 20 percent of radio news directors reported in a study that their news operations were making a profit in 2004, down from 22.5 percent a year earlier.<sup>181</sup>

With young adults diverting their attention from print and broadcast to online sources, traditional media have experienced a correspondingly sharp decline of young people in their audience. Over the past decade, the number of minutes spent consuming television, radio, and newspaper news declined by 25 percent for 25-29 year olds (compared to an 11 percent decline in the 35-49 age bracket).<sup>182</sup> Similarly, a 2002 Pew Research Center survey found that 25 percent of people under the age of 30 had read a paper the day before the survey, and that 30 percent of people in their thirties read a newspaper the previous day, down from 53 percent for people in their thirties a decade ago.<sup>183</sup>

These downward trends are expected to continue in the near future. A recent study found that, while 39 percent of 18-34 year-olds expect to increase their use of the

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<sup>180</sup> *Pew 2004 Fact Sheets—Local TV Page* (p. 4 of 8), at [http://www.pewtrusts.com/pdf/journalism\\_state\\_of\\_media\\_2004\\_facts.pdf](http://www.pewtrusts.com/pdf/journalism_state_of_media_2004_facts.pdf) (last visited Oct. 17, 2006). Similarly, a 2006 study by The Pew Research Center For The People & The Press concluded that “[b]roadcast news outlets continue to struggle—over the last two years alone, the audiences for nightly network, local TV news and radio news have all slipped.” The Pew Research Center For The People & The Press, *Maturing Internet News Audience—Broader Than Deep: Online Papers Modestly Boost Newspaper Readership*, *Pew Research Center Biennial News Consumption Survey* at 1 (July 30, 2006), at <http://people-press.org/reports/pdf/282.pdf> (last visited Oct. 17, 2006).

<sup>181</sup> *Project for Excellence in Journalism State of the Media Study*, at [http://www.stateofthenewsmedia.org/2006/narrative\\_radio\\_economics.asp?cat=4&media=9](http://www.stateofthenewsmedia.org/2006/narrative_radio_economics.asp?cat=4&media=9) (Chart Radio News Profitability – Survey of news directors, 1996-2004).

<sup>182</sup> *ASNE/NAA Media Usage Study* at 4.

<sup>183</sup> Andrew Kohut, *Young People are Reading—Everything But Newspapers*, *Colum. Journalism Review* (July 1, 2002) (concluding that “fewer people are reading newspapers, and the declines in readership are greatest among young adults and the younger segment of the baby boom generation”).

Internet as a source of news over the next three years, only 14 percent expect to increase their consumption of local TV news over that time period, and only eight percent expect to increase their use of daily newspapers.<sup>184</sup>

At the same time that the financial sector is increasingly diverting investment away from traditional media and turning instead to Internet ventures, these alternative media are free to expand their businesses, and thus operate more efficiently, in ways that are denied to newspaper publishers and broadcasters. There are no prohibitions, for example, on print oriented Internet sites from extending into the provision of audio or video service. Thus, while Internet leviathan Google is permitted to purchase top video entertainment site YouTube, a transaction valued at over \$1.6 billion,<sup>185</sup> local newspaper publishers and broadcasters are still saddled with the same regulatory prohibitions that have prevented them for over three decades from entering into a similar venture at the local level.

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As the Commission considers how the media marketplace has changed since its 2003 decision, all of these interrelated trends must be taken into account. The overarching conclusion that the agency reached in 2003 continues to capture the state of the marketplace: “[T]he question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the

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<sup>184</sup> ASNE/NAA *Media Usage Study* at 4.

<sup>185</sup> See Eric Auchard, *Google To Buy YouTube for \$1.65 Billion*, The Washington Post (from Reuters) Oct. 10, 2006, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/09/AR2006100900445.html> (last visited Oct. 20, 2006).

attention of Americans.”<sup>186</sup> Indeed, the accuracy of this observation has become more and more clear in the intervening years since the agency’s last comprehensive review. The marketplace undeniably has become far more diverse, competitive, and crowded with news and information voices, and the role of once-dominant traditional media correspondingly has waned. The competitive challenges facing traditional newspapers and broadcasters only have become more apparent since 2003, making the need for regulatory relief even more critical than it was just three years ago.

**B. The Internet Now Undeniably Plays A Central Role Providing News And Information To American Consumers**

One of the Third Circuit’s central questions concerning the FCC’s 2003 analysis of issues relating to cross-ownership focused on the importance the agency accorded to the Internet as a source of local news and information. In particular, the Court found that “[t]he Commission does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet.”<sup>187</sup> While acknowledging that the record contained ample information regarding national news sources and locally oriented information online, the Third Circuit found that the record lacked sufficient information concerning independently owned “media outlets” devoted to local news.<sup>188</sup>

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<sup>186</sup> 2003 Order, 18 FCC Rcd at 13,766 (¶ 367).

<sup>187</sup> *Prometheus*, 373 F.3d at 406.

<sup>188</sup> *Id.* at 406-08. In particular, the majority indicated that only what it defined as “media outlets”—meaning those that provide an “aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, *etc.*)”—should be taken into account by the Commission. *Id.* at 407. By contrast, “local individuals (such as political candidates) and entities (such as local governments or community organizations),” did not, according to the court, rise to the level of contributing to the diversity in the local news and information marketplace. *Id.* NAA believes that the court’s analysis leads to an unrealistic and unnecessarily limited view of the multitude of ways in which the Internet provides local news and information. Nonetheless, even using the

Even if the Court's assessment of the record before the agency in 2003 was appropriate, NAA submits that the Internet already was playing a critical role in the dissemination of both national and local news and information to American consumers when the Commission last examined the issue. In any event, there has been a veritable explosion of news and information on the Internet even since 2003, and the Web has taken center stage in reporting news and helping to frame the debate on important policy issues. In particular, given the meteoric rise of highly localized websites and online citizen journalism, the FCC should have no difficulty on remand establishing a complete record on the vital role that the Internet plays in the local marketplace for news and information.

1. *The Internet Has Continued To Evolve As A Fundamental Source Of News And Information For American Consumers*

On any given day, some 50 million Americans now turn to the Internet for news.<sup>189</sup> For a significant number of them, getting news online has become more common than opening up a local newspaper or turning on a radio. Nearly one-third of all Americans reportedly now receive news through the Internet regularly.<sup>190</sup> Among younger Americans (under age 36) with broadband service, the proportion increases significantly, to 46 percent, higher than the percentage that rely on national television (40

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Third Circuit's approach as a starting point, there is no question that the Internet offers a full range of local news and informational "media outlets."

<sup>189</sup> Pew Internet & American Life Project, *Online News: For Many Home Broadband Users, The Internet Is A Primary News Source* i (Mar. 22, 2006), at [http://www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf) (last visited Oct. 23, 2006) ("Pew Internet Online News Study").

<sup>190</sup> Pew Research Center for the People & the Press, *News Consumption and Believability Study* (July 30, 2006), at <http://people-press.org/reports/pdf/282.pdf>. (last visited Oct. 17, 2006). By contrast, less than one-third of the American population regularly received news through the Internet in 2000. *Id.* at 2.

percent), radio (41 percent), or the local newspaper (28 percent).<sup>191</sup> Reliance on the Internet for news also has surged for other groups, including minority populations. According to the Pew Research Center on People and the Press, the percentage of African Americans who go online regularly for news increased by over 60 percent between 2002 and 2004.<sup>192</sup> And the growing Hispanic population in the U.S. turns to the Internet for news at a higher rate than the general public.<sup>193</sup>

While Internet usage has become an important component in the media mix across all segments of the population, it is not surprising that its adoption rate as a source of news has been especially dramatic among young people.<sup>194</sup> As of July 2005, 87 percent of teens ages 12 to 17 used the Internet, and approximately 51 percent of teens were going online daily.<sup>195</sup> In 2005, 76 percent of teenagers accessed news online, an

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<sup>191</sup> *Pew Internet Online News Study i*, at [http://www.pewinternet.org/pdfs/PIP\\_News.and.broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.broadband.pdf). By contrast, less than one-third of the American population regularly received news through the Internet in 2000. *Id.*

<sup>192</sup> Pew Research Center for the People and the Press, *Media Consumption and Believability Study 8* (June 8, 2004), at <http://people-press.org/reports/pdf/215.pdf> (last visited Oct. 20, 2006).

<sup>193</sup> *Id.* at 18.

<sup>194</sup> A majority of young Americans also use the Web to research health information, make travel reservations, and hunt for jobs. Pew Internet & American Life Project, *Generations Online 3* (Dec. 2005) at [http://www.pewinternet.org/pdfs/PIP\\_Generations\\_Memo.pdf](http://www.pewinternet.org/pdfs/PIP_Generations_Memo.pdf) (last visited Oct. 17, 2006). Young people are the most likely group to explore new Internet technologies—such as blogs, downloadable video, and downloadable audio—as well as older ones, including gaming and instant messaging. *Id.* The youngest of them have come of age in a world where “google,” the lower-case form, is a verb. See ‘Google,’ ‘Unibrow’ Added to Dictionary, USA Today, July 6, 2006, at [http://www.usatoday.com/news/offbeat/2006-07-06-new-words\\_x.htm](http://www.usatoday.com/news/offbeat/2006-07-06-new-words_x.htm) (last visited Oct. 20, 2006); New Beloit College Mindset List Looks At Entering College Students, Growing Up With No Soviet Union, One Germany And Bar Codes, at <http://www.beloit.edu/~pubaff/mindset> (last visited Aug. 25, 2006).

<sup>195</sup> Pew Internet & American Life Project, *Teens and Technology 1, 4* (July 27, 2005), at [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Tech\\_July2005web.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf) (last visited Oct. 17, 2006).



increase from 38 percent in 2000.<sup>196</sup> In a recent study, nearly 60 percent of youth aged 14 to 22 reported that the Internet was their *primary* source of news.<sup>197</sup>

More specifically, the Internet is becoming a principal destination for political news and advocacy. During the 2004 election cycle, for example, 29 percent of the adult American population used the Internet to get political news and information.<sup>198</sup> Eighteen percent of registered voters labeled the Internet as a primary source of news about the 2004 presidential election.<sup>199</sup> As noted above and as widely reported in the press, candidates are increasingly turning to the Internet as a way to get their messages across to voters.<sup>200</sup>

Indeed, when it expressed skepticism over the value of that the Internet contributes to the distribution of news and information to the American public, the *Prometheus* majority did not have the benefit of knowing how extensively the Internet would affect political discourse in the very near future. Since the beginning of 2004, the Internet has been credited with nearly crowning a presidential nominee, Howard Dean, and sinking the primary hopes of an incumbent senator, Joseph Lieberman.<sup>201</sup> In

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<sup>196</sup> *Project for Excellence in Journalism State of the Media Study*, at [http://www.stateofthenewsmedia.org/2006/narrative\\_online\\_audience.asp?cat=3&media=4](http://www.stateofthenewsmedia.org/2006/narrative_online_audience.asp?cat=3&media=4).

<sup>197</sup> See Mary Zweiss Strange, *The 'Daily Show' Generation*, USA Today, Sept. 12, 2006, at 15A (reporting results of May 2006 study conducted by the Annenberg Public Policy Center of the University of Pennsylvania), at [http://blogs.usatoday.com/oped/2006/09/the\\_daily\\_show.html](http://blogs.usatoday.com/oped/2006/09/the_daily_show.html) (last visited Oct. 17, 2006).

<sup>198</sup> Lee Rainie, John Horrigan, and Michael Cornfield, Pew Internet and American Life Project, *The Internet and Campaign 2004* 4 (March 6, 2005), at [http://www.pewinternet.org/pdfs/PIP\\_2004\\_Campaign.pdf](http://www.pewinternet.org/pdfs/PIP_2004_Campaign.pdf) (last visited Oct. 17, 2006).

<sup>199</sup> *Id.* at 2.

<sup>200</sup> See Section III.A.1 & n. 134, *supra*.

<sup>201</sup> See Jeanne Cummings, *Behind Dean Surge: A Gang of Bloggers and Webmasters*, Wall St. J., Oct. 14, 2003, at A1 (describing development of the Howard Dean presidential campaign's use of the Internet to create political momentum); Sean Dodson & Ben Hammersley, *The Web's Candidate for President*, The

addition, bloggers raised extensive questions concerning CBS News' use of memos purporting to document President Bush's National Guard service, bringing questions about the coverage of this issue to the forefront of a national debate.<sup>202</sup> With respect to the upcoming mid-cycle elections, political experts predict that the sudden rise of amateur Internet video will preclude candidates from being able to "get away with making" even a single "offensive or dumb remark."<sup>203</sup>

Although the Third Circuit cautioned that the Internet is not universally available,<sup>204</sup> this no longer can be considered a legitimate cause for concern in evaluating its importance as a source of news and information. The latest FCC report on high-speed Internet access found that high-speed connections are available in 99 percent of United States ZIP codes.<sup>205</sup> Seventy-four percent of Americans now have Internet access in their

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Guardian (London), Dec. 18, 2003 (explaining how Internet activism took Howard Dean from "nowhere man of the presidential campaign" to "Democratic front runner"); Michael Martinez, *Campaigns; Web Activism Is Two-Edged Sword in Connecticut*, Nat. Journal Tech. Daily, Aug. 8, 2006 (tracing the evolution of online political activism from Howard Dean's campaign for the Democratic Party's presidential nomination in 2004 to the online campaign against Sen. Joe Lieberman in Connecticut's Democratic Party primary in 2006); David Lightman, *A Message, Loud and Clear*, Hartford Courant, Aug. 9, 2006, at A3 (crediting activist blogs with the defeat of Sen. Joe Lieberman in Connecticut's Democratic Party primary).

<sup>202</sup> See Joanne Jacobs, *New Media Beat Old in Testing Veracity of Bush Memos*, St. Louis Post Dispatch, Sept. 26, 2004, at B1 (discussing how bloggers quickly uncovered problems with the memos aired by CBS News); Stephen Humphries, *Blogs Look Burly After Kicking Sand on CBS*, Christian Science Monitor, Sept. 22, 2004, at Arts 1 (discussing influence of blogs in aftermath of CBS News memo incident and chronicling blogger investigations of the CBS News memos).

<sup>203</sup> Ryan Lizza, *The YouTube Election*, N.Y. Times, Aug. 20, 2006 (quoting Howard Wolfson, senior advisor to Senator Hillary Rodham Clinton), at <http://www.nytimes.com/2006/08/20/weekinreview/20lizza.html?ex=1313726400&en=a605fabfcb81eebf&ei=5088&partner=rssnyt&emc=rss> (last visited Oct. 20, 2006).

<sup>204</sup> *Prometheus*, 373 F.3d at 407-408.

<sup>205</sup> Industry Analysis and Technology Division, Wireless Competition Bureau, High-Speed Services for Internet Access: Status as of Dec. 31, 2005 at 1 (July 2006), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-266596A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf) (last visited Oct. 17, 2006).

homes,<sup>206</sup> a penetration level that is greater than that for cable television (69.4 percent)<sup>207</sup> or cell phones (69 percent).<sup>208</sup> For Americans who do not have an Internet connection in their homes, the options for accessing the Web elsewhere are ubiquitous. In 2004, 98.9 percent of all public libraries offered free access to the Internet, with nearly half of libraries supplying high-speed connections.<sup>209</sup> In some cities, most notably San Francisco, New Orleans, and Philadelphia, municipalities plan to provide wireless Internet either for free or at very low cost, so that anybody with access to a computer and a wireless card will be able to get on the Web.<sup>210</sup>

The Internet's colossal volume of information is also increasingly luring consumers online for news and information. As the FCC put it in 2003, "via the Internet, Americans can access virtually any information, anywhere, on any topic."<sup>211</sup> On the flip side, "any individual with access to a Web-hosting file server can create a Web site for

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<sup>206</sup> *Two-Thirds Of Active U.S. Web Population Using Broadband, Up 28 Percent Year-Over-Year To An All-Time High, According To Nielsen//NetRatings*, NetRatings, Inc. Press Release (Mar. 14, 2006), at [http://www.nielsen-netratings.com/pr/pr\\_060314.pdf](http://www.nielsen-netratings.com/pr/pr_060314.pdf) (last visited Oct. 17, 2006).

<sup>207</sup> *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2506 (¶ 8).

<sup>208</sup> CTIA, *Wireless Quick Facts* (April 2006), at [http://www.ctia.org/research\\_statistics/statistics/index.cfm/AID/10202](http://www.ctia.org/research_statistics/statistics/index.cfm/AID/10202) (last visited Oct. 17, 2006).

<sup>209</sup> *New Report: Public Libraries Connect People to Technology but Face Challenges in Sustaining Service*, Information Use Management And Policy Institute, College Of Information, Florida State University Press Release (June 2005), [www.gatesfoundation.org/nr/downloads/libraries/uslibraries/reports/FSU\\_fact\\_sheet.pdf](http://www.gatesfoundation.org/nr/downloads/libraries/uslibraries/reports/FSU_fact_sheet.pdf).

<sup>210</sup> See San Francisco TechConnect, at <http://www.sfgov.org/techconnect> (last visited Oct. 11, 2006); Wireless Philadelphia, at <http://www.wirelessphiladelphia.org> (last visited Oct. 11, 2006); City of New Orleans: Wireless Setup Information, at <http://www.cityofno.com/portal.aspx?portal=1&tabid=60> (last visited Oct. 11, 2006).

<sup>211</sup> *2003 Order*, 18 FCC Rcd at 13,623 (¶ 3).

public access,” and “[a]s such, the Web provides an unrestrained forum for the dissemination and consumption of ideas.”<sup>212</sup>

With respect to the latter point, one particularly notable development since the Commission and the Third Circuit last considered the issue has been the rise of the blog.<sup>213</sup> A blog can be created by any Internet user, generally at no cost. Technorati.com, a popular blog search engine, now claims to index over 52 million blogs, a number that has doubled every six months in the past three years.<sup>214</sup> Thirty-nine percent of Internet users now read blogs,<sup>215</sup> and nine percent get news from blogs, a number that inevitably will increase in the future.<sup>216</sup> Accordingly, among the many millions of sources of news and information available on the Web, citizen journalists are becoming increasingly prominent. In an acknowledgement of the growing influence of Internet journalism, the Pulitzer Prize Board recently decided to accept submissions from online sources in all prize categories.<sup>217</sup>

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<sup>212</sup> *Id.* at 13,662 (¶ 119).

<sup>213</sup> A blog, a contraction of the term “Web log,” is a website where entries are made in journal style and displayed in a reverse chronological order. *See* Wikipedia, Blog Article, at <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 16, 2006).

<sup>214</sup> David Sifry, State of the Blogosphere, August 2006, Sifry’s Alerts Weblog, at <http://www.sifry.com/alerts/archives/000436.html> (Aug. 7, 2006) (last visited Oct. 17, 2006) (Sifry, founder and CEO of Technorati.com, discusses growth in the blogosphere and other trends); Candace Lombardi, *There’s A Blog Born Every Half Second*, CNET News.com, Aug. 7, 2006, at [http://news.com.com/2100-1025\\_3-6102935.html](http://news.com.com/2100-1025_3-6102935.html) (last visited Oct. 17, 2006); Claire Adler, *Diary of a Somebody*, The Guardian (London), July 1, 2006, at 3, at <http://jobsadvice.guardian.co.uk/rise/story/0,,1810027,00.html> (last visited Oct. 17, 2006).

<sup>215</sup> Amanda Lenhart & Susannah Fox, Pew Internet & American Life Project, *Bloggers: A Portrait of the Internet’s New Storytellers* 1-2, 17, 22 (2006), at [http://www.pewinternet.org/PPF/r/186/report\\_display.asp](http://www.pewinternet.org/PPF/r/186/report_display.asp) (follow “View PDF of Report” hyperlink) (last visited Oct. 17, 2006).

<sup>216</sup> *Pew Internet Online News Study* iv, at [http://www.pewinternet.org/pdfs/PIP\\_News.and.broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.broadband.pdf).

<sup>217</sup> *See Web Journalism Now Eligible for Pulitzer Prize*, CBC Arts Online, Dec. 7, 2005, at <http://www.cbc.ca/arts/story/2005/12/07/Arts/pulitzer-online-051207.html> (last visited Oct. 17, 2006).

In considering the importance of the Internet as a source of news and information, the Commission also must be cognizant that online news contributes to the public discourse in a manner that is significantly different from mainstream media. The unique power of the Internet stems largely from its ability to permit users to participate in the distribution of news, either by selecting material that interests them or becoming a part of the development of the story by contributing their own observations and opinions. As more users consume Internet news and become willing to participate in its distribution and creation, the medium has become increasingly capable not only of performing the same functions as traditional news outlets, but also, in some respects, of going beyond traditional news delivery in terms of execution and presentation.

The Third Circuit suggested that cognizable news media should be defined by the ability to aggregate and distill information.<sup>218</sup> In fact, the Internet fulfills both of these functions in a way that the traditional media cannot. For example, many Internet news sites permit users to aggregate information based on their own stated preferences (My Yahoo!, Feedster, and other RSS tools), the suggestions of a large base of other users (Digg.com, reddit.com, and user-organized news websites), the suggestions of just one other user (Del.icio.us and social bookmarking sites), or even the suggestions of a computer (Google News, which was in Beta testing in 2003).

By avoiding the filters of the mainstream media, the Internet also is capable of supplying the public with sought-after content that traditional print or broadcast news operations decline to disseminate. Just by way of example, most television stations have shied away from airing graphic images of the Iraq war out of concern for the sensitivity

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<sup>218</sup> See *Prometheus*, 373 F.3d at 407.

of their audiences, but Americans who choose to do so have been able to access those photos online. Twenty-four percent of adult Internet users said they have seen graphic war images online, a percentage that equates to roughly 30 million people.<sup>219</sup>

2. *The Internet Now Plays A Critical Role In The Dissemination Of Local News And Information*

The contributions of the Internet to the general news and information landscape are mirrored in the local marketplace, which lies at the heart of the agency's viewpoint diversity concerns as well as the specific objections raised by the Third Circuit with respect to the Commission's prior analysis. In addition to the Internet sites of traditional media, the provision of online local news and information by alternative media, both advertiser-supported and non-profit, has flourished since 2003. Thirty-six percent of Americans who are online now use the Internet to get local news.<sup>220</sup> Locally oriented sites provide a rich source of unique information about or perspectives concerning community-wide issues. Importantly, a growing number also cater to highly specific, or even neighborhood oriented, issues that often are too narrow for coverage by the mainstream audience.<sup>221</sup>

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<sup>219</sup> Deborah Fallows & Lee Rainie, Pew Internet & American Life Project, *The Internet as a Unique News Source: Millions Go Online for News & Images Not Covered by the Mainstream Press* i, 2, 10 (2004), at [http://www.pewinternet.org/pdfs/PIP\\_News\\_Images\\_July04.pdf](http://www.pewinternet.org/pdfs/PIP_News_Images_July04.pdf) (last visited Oct. 17, 2006).

<sup>220</sup> Harris Poll #35, HarrisInteractive Inc., *Most Americans Who Are Online Use Internet for News, But Most Say This Does Not Reduce Their Use of Other News Media* (May 19, 2004), at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=464](http://www.harrisinteractive.com/harris_poll/index.asp?PID=464) (last visited Oct. 13, 2006).

<sup>221</sup> As Americans become more reliant on the Internet, they also are increasingly turning to it for local commerce. The seventh-most-popular web site in the world is now Craigslist, a site that caters specifically to residents of the 310 cities it serves using locally named web pages. Brian M. Carney, *Zen and the Art of Classified Advertising*, Wall St. J., June 17, 2006, at A10, at [http://online.wsj.com/public/article/SB115049840863382886-9QyN65ef6meo\\_D2UILOxAdRmbN0\\_20070616.html?mod=rss\\_free](http://online.wsj.com/public/article/SB115049840863382886-9QyN65ef6meo_D2UILOxAdRmbN0_20070616.html?mod=rss_free) (last visited Oct. 13, 2006). Seventy percent of Americans report that they look to the Internet for help when buying products and services locally. *New Research By The Kelsey Group and ConStat Indicates 70% of U.S. Households Now Use the Internet When Shopping Locally for Products and Services*, Kelsey Group Press Release (Mar. 22, 2005), at <http://www.kelseygroup.com/press/pr050322.asp> (last visited Oct. 13, 2006). To serve the demand for

- a. Internet sites co-owned with traditional media offer unique local content that enhances the diversity of information available to consumers

First, of course, American consumers regularly turn to the websites of their local newspapers and TV stations for news and information. Indeed, the sites of daily newspapers and television broadcasters are, collectively, the nation's third and fourth most popular news destinations on the Internet.<sup>222</sup> The Third Circuit suggested that, because these online sources are co-owned with other local media outlets, the FCC had not demonstrated that they make a distinct contribution to the diversity of viewpoints in local markets.<sup>223</sup>

In fact, however, the websites offered by existing newspaper/broadcast combinations do far more than just mirror the content developed by each individual newspaper, radio, or television station.<sup>224</sup> Because of the immense capacity and unique attributes of the Internet, newspaper publishers and broadcasters are able to greatly differentiate their print, over-the-air, and online products and supplement the information they would otherwise be able to offer their audiences. For example, newspapers can provide video content on the Internet that they could not offer in print form. Thirty-nine

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local information, Google introduced its locally focused search engine, Google Local, in April 2004; Yahoo! followed with its own local search engine seven months later. Stefanie Olsen, *Google Goes Local*, CNET News.com, Mar. 17, 2004, at [http://news.com.com/2100-1038\\_3-5173685.html](http://news.com.com/2100-1038_3-5173685.html) (last visited Oct. 13, 2006) (announcing launch of Google Local); Dawn Kawamoto, *Yahoo! Launches Local Search Engine*, CNET News.com, Oct. 4, 2004, at [http://news.com.com/Yahoo+launches+local-search+engine/2110-1024\\_3-5394882.html](http://news.com.com/Yahoo+launches+local-search+engine/2110-1024_3-5394882.html) (announcing launch of Yahoo! Local) (last visited Oct. 13, 2006).

<sup>222</sup> Pew Internet Online News Study 10-12, at [http://www.pewinternet.org/pdfs/PIP\\_News.and.broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.broadband.pdf).

<sup>223</sup> *Prometheus*, 373 F.3d at 405-06 (“There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an ‘independent’ viewpoint and thus should not be considered as contributing diversity to local markets.”).

<sup>224</sup> See Section III.C., *infra*.

of the top 40 daily newspapers in the U.S. now use video on their websites,<sup>225</sup> and the Associated Press alone provides video clips for more than 1,100 newspaper websites.<sup>226</sup>

Indeed, a growing number of daily newspapers now offer local audiences full-blown newscasts online. Importantly, many of these fill gaps in local television news coverage. For instance, in the Fort Myers-Naples, Florida market, *The Naples Daily News* recently began producing “Studio 55,” a half-hour webcast featuring “hyper-local” news focused specifically on Naples. The local broadcast affiliates, in contrast, are focused primarily on news from Fort Myers, approximately 40 miles from Naples. The news programs can be viewed online as well as downloaded on iTunes and run twice daily on a Comcast cable channel.<sup>227</sup>

In Wilmington, Delaware, *The News Journal* webcasts daily morning and evening local news.<sup>228</sup> Because Delaware has no local TV news, the service fills an important void.<sup>229</sup> Similarly, last December, the interactive division of *The Virginia Pilot* launched HamptonRoads.tv, a portal offering local video. To differentiate itself from local

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<sup>225</sup> Allison Romano, *The Paper Chase: Stations Play Catch Up With Newspapers Online*, Broadcasting & Cable, Aug. 14, 2006, at 4, at <http://www.broadcastingcable.com/article/CA6361915.html> (last visited Oct. 13, 2006) (“Romano Paper Chase Article”).

<sup>226</sup> *Id.* More generally, 69 percent of online users have watched online video, with nearly 25 percent watching at least once a week. Online Publishers Association, *From Early Adoption to Common Practice: A Primer to Online Video Viewing* 8 (March 2006), at [http://www.online-publishers.org/pdf/opa\\_online\\_video\\_study\\_mar06.pdf](http://www.online-publishers.org/pdf/opa_online_video_study_mar06.pdf) (last visited Oct. 13, 2006).

<sup>227</sup> *Romano Paper Chase Article*, at <http://www.broadcastingcable.com/article/CA6361915.html>.

<sup>228</sup> *Id.*

<sup>229</sup> American Society of Newspaper Editors & Newspaper Association of America, *Growing Audience: Innovation in Action* 20 (2006), at <http://www.growingaudience.com/downloads/innovation-in-action.pdf> (last visited Oct. 13, 2006) (“ASNE/NAA Innovation Study”).



television newscasts, the service focuses on hyper-local stories aimed at 18-34 year olds.<sup>230</sup>

More broadly, both newspaper publishers and broadcasters are able to provide more innovative and in-depth coverage of any given issue, as well as coverage of a far greater number of issues at any one time, than their traditional outlets would permit.<sup>231</sup> Unlike a newspaper and, except in rare circumstances, broadcast news, an Internet site is typically updated continuously throughout the day.<sup>232</sup> Moreover, the websites operated by local newspaper publishers and broadcasters often provide additional vehicles for discussion of public affairs. In particular, through blogs or other public forums, many sites offer opportunities for consumer feedback, commentary, and interaction that is unavailable in a newspaper or on the radio or television. The combination of audience input with the ability to constantly update the news and information morphs traditional video or print content into something new and unique.

By way of example, the publisher of *The Spokesman-Review* in Spokane, Washington uses the Internet to make its newsgathering and publishing processes far more transparent to its local audience. In particular, the publisher webcasts its daily news meetings and posts original source materials—such as interview transcripts and, on major stories, even handwritten reporter notes—to the newspaper’s website. In addition, the

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<sup>230</sup> *Romano Paper Chase Article*, at <http://www.broadcastingcable.com/article/CA6361915.html>. In addition, NYTimes.com has five dedicated video journalists, and many of the paper’s reporters now integrate video cameras into their reporting. *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> One daily newspaper that has capitalized on the immediacy of the Internet to change the character of its news reporting is *The San Diego Union-Tribune*. In 2005, the newspaper launched a breaking news team specifically charged with filing updates to its website, SignonSanDiego.com. The team keeps the site updated 18 hours a day, seven days a week. As a result, the website often scoops the newspaper by posting breaking news late in the day, many hours before the print edition is released to the public the following morning. See ASNE/NAA *Innovation Study* at 13-15.

website offers editor blogs to explain the news of the day as well as online chatrooms where readers can criticize news coverage or pose questions.<sup>233</sup>

Other newspaper publishers have capitalized on the Internet to make the inner workings of government more open to the American public. Among the innovative services offered on the website of *The Washington Post* is a searchable database, updated daily, which enables the public to research every recorded vote in the U.S. House of Representatives and Senate since January 1991.<sup>234</sup> Users can research votes in several different ways—by legislator, by chamber, by state, or by party—and also can track the latest vote by any member of Congress. In addition, the database includes an interactive map for monitoring battleground congressional races as well as links to campaign finance information.

Using the Internet to equip communities along the Atlantic coast with better resources to cope with weather emergencies, the *Herald-Tribune* in Sarasota, Florida has developed an in-depth, risk-estimator website to track Atlantic Ocean tropical storm and hurricane activity. The extensive site can calculate specific buildings that are at risk for hurricane damage as well as report actual damages.<sup>235</sup> Users can view 155 years of hurricane activity and damage through a database that was created from public records of 8 million properties in the State of Florida. Via real-time weather alerts, residents can

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<sup>233</sup> See SpokesmanReview.com Webcast, at <http://www.spokesmanreview.com/webcast/> (last visited Oct. 12, 2006); SpokesmanReview.com Daily Briefing, at <http://www.spokesmanreview.com/blogs/briefing/> (last visited Oct. 12, 2006).

<sup>234</sup> See The U.S. Congress Votes Database, at <http://projects.washingtonpost.com/congress/> (last visited Oct. 11, 2006).

<sup>235</sup> See IBISEYE: Hurricane Tracking Service, at <http://www.ibiseye.com/> (last visited Oct. 11, 2006).

map and track storms as they are developing. In addition, users can submit their own forecasts of a storm's path, assess possible damage, and report actual damage.

The publisher of the daily *The Bakersfield Californian* and free community newspapers *The Northwest Voice* and *The Southwest Voice* offers its local community a variety of online resources. Like a growing number of dailies, the official website of *The Bakersfield Californian* offers a variety of community blogs that enable readers to provide their input on local and national events and policy issues.<sup>236</sup> Similarly, the vast majority of the information and photographs on the websites of *The Northwest Voice* and *The Southwest Voice* are supplied by readers, community organizations, and local schools and churches.<sup>237</sup>

These are just a few examples of the many ways in which traditional newspapers are increasingly turning to the Internet to offer their local markets a richer variety of news, information, and community platforms. Much of the content provided via the websites of traditional media would not exist absent the Internet. NAA submits that it would be erroneous and short-sighted to conclude that this wealth of information simply makes no contribution to local diversity. Ultimately, it is the amount and variety of information available to the American public that is the most critical element in an analysis of diversity—not the number or identity of outlet owners or other content providers.

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<sup>236</sup> See Bakersfield.com Community Blogs, at <http://www.bakersfield.net/blogs/> (last visited Oct. 11, 2006).

<sup>237</sup> See *The Northwest Voice: About Us*, at <http://www.northwestvoice.com/> (follow “About Us” hyperlink) (last visited Oct. 11, 2006); *The Southwest Voice Home Page*, at <http://www.swvoice.com/> (last visited Oct. 11, 2006). An additional online service offered by the same publisher is Bakomatic, a participatory website for young adults in Bakersfield. See Bakotopia, at <http://www.bakotopia.com/> (last visited Oct. 11, 2006).

- b. There are now a plethora of fully independent local news and information sources on the Internet

Moreover, there is now a wealth of local news and information on the Internet that is fully independent from that provided by television and newspaper web sites. Coinciding with the general boom in independent Internet publishing as a whole, such sources have mushroomed over the past several years. Attesting to the rising influence of local online journalism, local bloggers are increasingly gaining recognition among the mainstream media as well as in local politics. For example, *Time Magazine* recently hired Ana Marie Cox to be Time.com's Washington editor after she finished a stint as editor of Wonkette, a news blog focused on the Washington, D.C. political scene.<sup>238</sup> In Westport, Connecticut, residents recently elected the editor of WestportNOW.com, the town's Internet-only news source, as their mayor.<sup>239</sup>

The universe of independent local news web sites can be broken down into roughly three categories: (1) advertiser-supported local sites, many of which are affiliated with a network of other local sites; (2) so-called "placeblogs" or "metro blogs," which focus on a particular region, city, town, or neighborhood, and (3) neighborhood message boards. A brief description of each category, with examples, follows.

***Advertiser-Supported Local Sites:*** There are now an increasing number of local news web sites run not by traditional media companies, but instead by media companies dedicated exclusively to online publishing. These alternative media companies typically run a network of local sites that cover relatively large metropolitan areas. One

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<sup>238</sup> *Ana Marie Cox Named Washington Editor*, Time Inc. News Release (July 27, 2006), at [http://poynter.org/forum/view\\_post.asp?id=11657](http://poynter.org/forum/view_post.asp?id=11657) (last visited Oct. 13, 2006).

<sup>239</sup> WestportNow: About Us, at <http://www.westportnow.com/index.php?/Info/about> (last visited Oct. 13, 2006).

particularly well-trafficked example is Gothamist.com, a New York-based local news site owned and operated by Gothamist LLC. Like a newspaper, Gothamist.com relies on advertising support and employs separate editors for its arts, food, health, and weather sections. As a prominent ad buyer recently explained to *New York Magazine*, “[y]ou wanna reach New York, you buy on Gothamist.”<sup>240</sup> The website also does its own reporting, such as a piece on the 2003 Manhattan blackout that subsequently was noted in the *New York Times*.<sup>241</sup> Gothamist is updated a dozen times a day and is published exclusively online. Other examples include:

- **Gapers Block** (www.gapersblock.com), of Chicago, is organized like a newspaper, with distinct sections for news, commentary, events, and music reviews. Owned and operated by Gapers Block Media, the site both employs staff writers and relies on readers for news tips, photos, and articles for its weekly features section.
- **Blogging Ohio** (www.bloggingohio.com), operated by Weblogs, Inc., serves Akron, Cincinnati, Cleveland, Columbus, Dayton, and Toledo by commenting on state politics, social events, and sports. Weblogs, Inc. also operates Engadget, the well-known consumer electronics blog, as well as 85 other focused web sites. The company was acquired by America Online in October 2005, but retains its “editorial control and independence.”<sup>242</sup>
- **Newsvine—Phoenix** (phoenix.newsvine.com) relies on its readers to submit Phoenix-related articles and to organize its virtual front page by voting on important stories. The more votes a story receives, the higher on the front page it jumps. In addition to its Phoenix site, Newsvine, Inc. also owns and operates reader-organized news web sites for 209 other American cities, from Abilene, Texas, to Zanesville, Ohio.
- **Metroblogging Atlanta** (atlanta.metblogs.com), owned and operated by Bode Media, Inc., launched in August 2004 as part of a network of local blogs that now reach 45 cities worldwide. Written by Atlanta residents, the site is a smorgasbord

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<sup>240</sup> Clive Thompson, *Blogs to Riches: The Haves and Have-Nots of the Blogging Boom*, N.Y. Magazine, Feb. 20, 2006, at <http://www.newyorkmetro.com/news/media/15967> (quoting ad buyer Brian Clark) (last visited Oct. 13, 2006).

<sup>241</sup> See Amy Harmon, *The Bits Are Willing, But The Batteries Are Weak*, N.Y. Times, Aug. 18, 2003, at C1.

<sup>242</sup> *America Online Acquires Weblogs, Inc.*, Time Warner Press Release (Oct. 6, 2005), at <http://www.timewarner.com/corp/newsroom/pr/0,20812,1114578,00.html> (last visited Oct. 13, 2006).

of local political discussion, local events coverage, sports news, and restaurant reviews.

- **Backfence Bethesda** ([www.backfence.com/bethesda](http://www.backfence.com/bethesda)), serving Bethesda, Maryland, is part of a network of user-maintained “hyper-local” websites owned and operated by Backfence Inc. and concentrating on small local areas. The company also operates local sites in six other Washington, D.C. suburbs (Arlington, Ashburn, Chantilly, McLean, Reston, and Sterling, Virginia) and two Silicon Valley communities. The articles on each site are posted entirely by users and are not altered by editors before reaching the front page.
- **DCist** ([www.dcist.com](http://www.dcist.com)) is another in Gothamist LLC’s network of local blogs, along with sites for Austin, Boston, Chicago, Houston, Los Angeles, Miami, New York, Philadelphia, San Francisco, and Seattle. With a staff of over 30, the site includes political analysis of the Washington, D.C. mayoral race, and heated discussion on current local issues, such as D.C.’s summer crime wave and government efforts to relieve the area’s traffic congestion.

**Placeblogs/Metro Blogs:** “Placeblogs” or “metro blogs” refer to a rising number of blogs that provide news to specific local communities. These sites generally serve areas that lack daily newspapers or where, in the opinion of the author, the newspaper does not provide adequate coverage of local events.<sup>243</sup> Estimates of the number of placeblogs range from 400 to 1,000. Most are run as a labor of love by residents interested in community affairs, although some, such as Barista of Bloomfield Ave., described below, attract some local advertising. Examples of some of the more prominent placeblogs include:

- **Cambridge Civic Journal** ([www.rwinters.com](http://www.rwinters.com)) is authored by Wellesley College professor Robert Winters, who told a bloggers conference in August 2006 that he often sees his reporting on Cambridge, Massachusetts news and affairs duplicated in mainstream media outlets.<sup>244</sup> The site includes comprehensive coverage of local Cambridge city council and school board elections.

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<sup>243</sup> See Barry Parr, *Things I Wish I’d Known Before I Became a Citizen Journalist*, Nieman Reports Vol. 59 No. 4, 29-30 (Winter 2005), at <http://www.nieman.harvard.edu/reports/05-4NRwinter/Parr-NRw05.pdf> (last visited Oct. 13, 2006) (noting that, on many weeks, the local weekly paper in San Mateo County, California, covers stories that already have been reported on the placeblog Coastsider).

<sup>244</sup> Amy Wyeth, ‘Citizen Journalists’ Aim to Reach Regular Joes, Cambridge Chronicle, Aug. 10, 2006, at <http://freepress.net/news/17014> (last visited Oct. 13, 2006).

- **WestportNOW** ([www.westportnow.com](http://www.westportnow.com)) became so popular among its Westport, Connecticut, readers that, as noted above, it launched its founder, Gordon Joseloff, to the town's mayoral office. Joseloff, a former CBS News correspondent, saw an opportunity to report on news not regularly covered by the Westport's weekly and biweekly papers. The site has become a local fixture, with some of its stories being picked up by the *New York Times* and the local cable news station, News-12.<sup>245</sup>
- **H20town** ([www.H20town.info](http://www.H20town.info)) serves Watertown, Massachusetts, and is operated by Lisa Williams. Watertown has no daily newspaper and, therefore, Watertown residents looking for print news otherwise are limited to news from a weekly paper, the *Watertown TAB*, and occasional coverage in the Boston-area dailies.
- **Coastsider** ([www.coastsider.com](http://www.coastsider.com)) concentrates on the San Mateo County, California coastal community, whose residents previously could find community-oriented news through a weekly newspaper but no dailies. The site includes a "Top News" section, an event calendar, traffic alerts, an active community message board, and links to other local web sites.
- **Barista of Bloomfield Ave.** ([www.baristanet.com](http://www.baristanet.com)) is the brainchild of former print journalists Debbie Galant and Liz George, who now dedicate a significant amount of their time to maintaining the northern New Jersey news blog. In addition to local news coverage, the site includes reviews of local shops, restaurants, services, and events, as well as crime alerts.

**Neighborhood Message Boards:** Before the World Wide Web came into existence, the most common destinations on the Internet were electronic bulletin boards systems ("BBS"), which brought together users with common interests, often from different parts of the world. Now web-based message boards often bring together people who live down the street from each other. Operated by neighborhood associations, local government entities, or even loosely organized community members, neighborhood message boards contain discussions on local crime trends, neighborhood revitalization, and local and state elections. They often provide the only source of highly-localized or

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<sup>245</sup> Gordon Joseloff, *WestportNow: Community Publishing Via Weblog*, Cyberjournalist.net, Oct. 3, 2003, at <http://www.cyberjournalist.net/news/000742.php> (last visited Oct. 13, 2006); see also Fran Silverman, *A First Selectman Steps Aside as Editor*, N.Y. Times, Nov. 27, 2005, at 14CN-2.

neighborhood news, when local newspapers and broadcast stations are dedicated to broader community-wide coverage.

For example, the Mount Pleasant DC Forum ([www.mtpleasantdc.org/forum](http://www.mtpleasantdc.org/forum)) serves the northwest Washington, D.C. neighborhood of Mount Pleasant and has over 1,300 registered users. Among thousands of examples nationwide, neighborhood message boards also thrive in Glenwood, a neighborhood in Brooklyn ([www.glenwoodbrooklyn.com/cgi-bin/yabb/YaBB.pl](http://www.glenwoodbrooklyn.com/cgi-bin/yabb/YaBB.pl)) and Plaza Midwood of Charlotte, North Carolina.

Even if the amount of local news and information available on the Internet may have been limited when the Commission and the Third Circuit last examined the issue, the marketplace has changed dramatically in the three short years since the *Omnibus Rulemaking* decision. Alternative providers of news and information, particularly citizen journalists, have now spread the irreversible tide of the Internet to the dissemination of local news and information to American consumers.<sup>246</sup>

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<sup>246</sup> The transformative impact that the Internet has had on the media marketplace also has important First Amendment implications. The Internet's rapid emergence as a global communications powerhouse has, in fact, made total hash of the Commission's historic arguments in favor of limiting the constitutional protections available to other participants in our nation's marketplace of ideas—*i.e.*, radio and television broadcasters and, by association, newspaper publishers. Those arguments are predicated on an understanding that there was a *physical limitation* in the number of channels that could be allocated to any given community. See *CBS v. DNC*, 412 US 94, 101(1973). This contention was “not based on the absolute number of media outlets, but [rather], on the fact that, . . . ‘there are substantially more individuals who want to broadcast than there are frequencies to allocate.’” *Repeal or Modification of the Personal Attack and Political Editorial Rules*, Order and Request to Update Record, 15 FCC Rcd 19,973,19,979 (¶ 18) (2000) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)). In the age of the Internet, the reverse is true—*i.e.*, the demand for capacity is consistently lower than the supply. Moreover, the Internet has a demonstrated ability to expand its capacity to keep pace with rapidly growing demand. At an extraordinarily low cost, any individual or organization can transmit messages of their own choice to interested parties across the nation and around the world.



C. **Existing Newspaper/Broadcast Combinations Continue To Produce Clear And Substantial Public Interest Benefits Without Threatening Diversity**<sup>247</sup>

As NAA has demonstrated to the Commission on numerous occasions, repeal of the newspaper/broadcast cross-ownership ban unquestionably would promote the agency's localism objectives.<sup>248</sup> In particular, relying on concrete examples provided by many of the newspaper/broadcast combinations currently in existence, NAA and other parties have shown unequivocally that cross-ownership results in superior local news and public affairs coverage. Both the FCC and the Third Circuit have agreed.<sup>249</sup> Thus, it is now well-established that removing the restriction would allow combinations to take advantage of operational synergies and efficiencies that would, in turn, enable them to devote more resources to core media functions, including the production of increased, in-depth news and informational programming. Further, both the FCC and the Third Circuit have recognized that there is no evidence that eradicating the cross-ownership prohibition would cause any material reduction in viewpoint diversity.<sup>250</sup> To the contrary, by abandoning the rule, the agency likely would foster diversity by facilitating the ability of

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<sup>247</sup> Unless otherwise noted, the factual information concerning existing newspaper/broadcast combinations provided in this section is derived from a survey distributed in August 2006 to its member newspapers that are currently jointly owned with one or more co-located broadcast outlets. See Statement of Paul J. Boyle, NAA's Senior Vice President, Public Policy (Attachment 1).

<sup>248</sup> See, e.g., *NAA 2001 Comments* at Section IV.A.; *NAA 2001 Reply Comments* at Section II; *NAA 2003 Comments* at Section III.A.

<sup>249</sup> The Commission concluded in the *2003 Order* that "efficiencies may increase the amount of diverse, competitive news and local information to the public and allow the combined entities to compete more effectively in an increasing by fragmented and competitive market." *2003 Order*, 18 FCC Rcd at 13,756 (¶ 347); see also *id.* at 13,753-54 (¶¶ 342-43) (suggesting that banning newspaper/broadcast combinations may actually inhibit the delivery of quality local news and public affairs programming); see also *Prometheus*, 373 F.3d at 398-99.

<sup>250</sup> See *2003 Order*, 18 FCC Rcd at 13,748, 13,760-767 (¶¶ 330, 355-67) (concluding that viewpoint diversity will not be harmed through elimination of the newspaper/broadcast cross-ownership rule); *Prometheus*, 373 F.3d at 399-400 (concluding that there was adequate evidence to support the Commission's determination that elimination of the cross-ownership rule would not harm diversity).

local publishers and broadcasters to provide more varied and extensive local content through multiple delivery vehicles.

Since the FCC last considered these issues, the public interest benefits arising from cross-ownership, where it has been allowed to exist, have continued unabated. As demonstrated below, the existing combinations continue to provide the best case studies of the localism effects that would be triggered by elimination of the ban. At the same time, jointly owned outlets have sustained their general practice of maintaining separate news operations and editorial independence. In the intervening years since the Third Circuit issued its remand decision, however, the long outdated cross-ownership rule has persisted in unnecessarily precluding local publishers and broadcasters from operating more efficiently and bringing analogous public interest benefits to additional local communities.

1. *Existing Newspaper/Broadcast Combinations Continue To Realize Extensive Public Interest Benefits From The Operational Synergies Created By Cross-Ownership*

The record already before the agency, developed during its previous attempts to modify the newspaper/broadcast cross-ownership rule, is replete with evidence of the local benefits provided by existing combinations.<sup>251</sup> As explained above, when the FCC last examined the cross-ownership restriction, it relied on conclusive empirical evidence, as well as a plethora of real-world examples, demonstrating that existing newspaper-owned broadcast stations typically produce local news in higher quantity and with better quality than other stations.<sup>252</sup> No substantial evidence has come to light refuting this conclusion and, in fact, this pattern has been reconfirmed since 2003. Recent experience

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<sup>251</sup> See, e.g., *NAA 2001 Comments* at Section IV.A-B.

<sup>252</sup> See Section II.B., *supra*.

demonstrates that the operational efficiencies inherent in cross-ownership continue to enable joint owners to focus their efforts on developing quality programming oriented to the needs and interests of the local community. Particularly via the Internet, newspaper/broadcast combinations also are continually finding new ways to share resources in order to create an array of unique, enhanced, and innovative services.

The benefits to consumers have been particularly pronounced in a number of small markets, where standalone media outlets often do not have the resources to provide the same level of service as their larger market counterparts. For example, *The Free Lance-Star*, WFLS(FM), WWUZ(FM), WYSK(FM), and WYSK(AM), all serving the Fredericksburg, Virginia metropolitan area, have been able to leverage their combined resources to realize an annual cost savings of over \$500,000 on rent and staffing. The newspaper and broadcast properties are able to combine their administrative resources, technical and information services, and human resources staff to streamline their behind-the-scenes operations and devote more resources to local news and public affairs programming.

This year, WFLS(FM) expanded its daily news to include the earliest newscast in the Fredericksburg area, beginning at 5:00 a.m. WFLS(FM) is now the only radio station in the metro area to broadcast any substantial news outside of the morning drive time, with newscasts at noon, 4 p.m., 5p.m., and 6 p.m. According to the associate publisher of *The Free Lance-Star*, the impressive quality of the programming presented by WFLS(FM), the most popular station in the Fredericksburg market, is based in large part on its ability to share resources with the newspaper.

The combination also has been able to broaden its overall coverage of major news events. If there is breaking news in the Fredericksburg metro area, the radio stations

immediately bring it to the attention of listeners. Using its own reporters, the newspaper focuses on covering the story in-depth. Further, *The Free Lance-Star* and the co-owned stations post information both on their own independent websites and on <[www.fredericksburg.com](http://www.fredericksburg.com)>, an additional online resource that is a collaboration among all of the jointly owned properties. Stories offered on this site are prepared separately by the newspaper or radio stations; each story contains a byline indicating the source of the information.

The value of the news programming created by the Fredericksburg combination has not gone unnoticed. WFLS(FM) has received numerous awards for its news coverage in the past several years, including a regional RTNDA award for Best News Documentary in 2006 and Best Web Site for a Small Market in 2004, 2005, and 2006. It also was named the Outstanding News Operation of the Year in 2004 and 2006 by the Virginia Associated Press Broadcasters. In addition, the station received Clarion Awards for Major News Event coverage in 2003 and Best Newscast in 2006, as well as a Best Newscast Award from the Virginia Association of Broadcasters in 2004. *The Free Lance-Star* has received analogous honors. For example, in 2005 two *Free Lance-Star* employees were honored by the Washington Chapter of the Society of Professional Journalists for Excellence in Local Journalism. In 2006, the newspaper received two of only 13 awards given by the Association of Opinion Page Editors for The Year's Best Op/Eds.

Similarly, *The News-Gazette*, WDWS(AM), and WHMS(FM) in Champaign, Illinois have continued to integrate their operations to bring better quality content to readers and listeners. Now realizing an annual savings of nearly \$100,000 from combining the technical, financial, administrative, and maintenance resources of the

newspaper and radio stations, this combination has been able to expand its news content on the radio and offer listeners additional local public affairs programming. For example, WDWS(AM), an all-news and public affairs station, was able to replace syndicated news and talk programming with a 3-hour daily local talk show in 2004. This year, the station had the resources to add a weekday sports talk program that emphasizes local high school coverage. Within the past two years, WHMS(FM) has added two newscasts to its everyday lineup, increasing its overall local news broadcasts to 40 hours per week.<sup>253</sup>

*The News-Gazette* and the two stations also have combined their resources to broaden and improve their online offerings. The website for *The News-Gazette*, <[www.news-gazette.com](http://www.news-gazette.com)>, includes information from all three outlets. Recent innovations on the site include podcasts and a *News-Gazette* weblog, which offers an additional forum for local opinion and commentary. By opening its website to additional voices in the community that do not appear in the paper or the co-owned radio stations, the Internet site clearly increases the diversity of viewpoints on community issues.

Although News-Gazette's existing newspaper/broadcast combination was grandfathered by the FCC in 1975, the Company has been disadvantaged for decades by its inability to expand its radio holdings, particularly in light of the fact that substantially larger radio groups are now permissible under the Commission's local radio ownership rule.

Likewise, Media General recently has documented to the Commission the continuing benefits of local cross-ownership reflected in several of its

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<sup>253</sup> According to John Foreman, the head of the news department at WHMS(FM), the station is the market's only local music station with a full-time in-house news department. Further, due to the savings realized through the combination, *The News-Gazette* and the two co-owned radio stations were able to resurrect a news intern program that allows students from the University of Illinois, Parkland College, and Eastern Illinois University to get real-world news experience.

newspaper/broadcast combinations.<sup>254</sup> The experiences of the *Opelika-Auburn News* and WRBL-TV in Columbus, Georgia are illustrative.<sup>255</sup> Drawing on the resources available at the *Opelika-Auburn News*, WRBL-TV has been able to increase its weekly news coverage by five hours since acquiring the newspaper in 2000.<sup>256</sup> The staffs of the two media outlets have collaborated on dozens of stories.<sup>257</sup> As Media General has explained in detail, both outlets have aired numerous stories of interest to the community that would have been unavailable, due to lack of resources, had the properties not been co-owned.<sup>258</sup>

Media General's jointly-owned *Bristol Herald Courier* and WJHL-TV in the Tri-Cities, Virginia-Tennessee DMA have witnessed similar success.<sup>259</sup> With the additional news and informational resources made available by the *Bristol Herald Courier*, WJHL-TV also has been able to expand its weekly news schedule by five hours, including the

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<sup>254</sup> See Media Gen. Broad. of S.C. Holdings, Inc. Waiver Request (Aug. 2, 2004), appended as Attachment 14 to Application For Renewal Of Broadcast Station License, FCC Form 303-S, at [http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101018409&formid=303&fac\\_num=66407](http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101018409&formid=303&fac_num=66407) ("WBTW-TV Waiver Request"); Media Gen. Broad. Of S.C. Holdings, Inc. Waiver Request (Dec. 1, 2004), appended as Attachment 14 to Application For Renewal Of Broadcast Station License, FCC Form 303-S, at [http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=350517](http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=350517) ("WRBL-TV Waiver Request"); Media Gen. Broad. Of S.C. Holdings, Inc. Waiver Request (October 2004), appended as Attachment 14 to Application For Renewal Of Broadcast Station License, FCC Form 303-S, at [http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=259269](http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=259269) ("WMBB-TV Waiver Request"); Media Gen. Broad. Of S.C. Holdings, Inc. Waiver Request (April 1, 2005), appended as Attachment 14 to Application For Renewal Of Broadcast Station License, FCC Form 303-S, at [http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=300761](http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=300761) ("WJHL-TV Waiver Request").

<sup>255</sup> See WRBL-TV Waiver Request.

<sup>256</sup> *Id.* at 7.

<sup>257</sup> See *id.* at 8.

<sup>258</sup> See *id.* at 7. For example, reporters from the *Opelika-Auburn News* and WRBL traveled jointly to New York City immediately after September 11 to cover the event from a local angle. *Id.*

<sup>259</sup> See WJHL-TV Waiver Request.

addition of a 5:30 to 6:00 a.m. weekday newscast in 2005.<sup>260</sup> The two outlets regularly join forces to broaden their coverage of issues of interest to the community. For example, both contribute to regular “Hometown Heroes” features documenting the achievements of local residents.<sup>261</sup> Likewise, the newspaper and the station have increased their medical reporting, cooperating on a medical watch feature and a monthly medical primer.<sup>262</sup> More generally, WJHL-TV typically calls on the expertise and experiences of various *Bristol Herald Courier* reporters to develop more detailed and in-depth reports on events in the surrounding community.<sup>263</sup>

The *Jackson County Floridian* and WMBB-TV similarly have brought additional local news to the Panama City, Florida community.<sup>264</sup> Like the combinations in other Media General markets, WMBB-TV was able to add a weekly half-hour news program in the fall of 2002 because of the additional newsgathering support provided by the *Jackson County Floridian*.<sup>265</sup> Additionally, with the help of the reporters and staff of the newspaper, the station recently has provided a series of in-depth local news stories, including coverage of the deployment of local National Guard troops to Iraq and the development of a new interstate highway in the region.<sup>266</sup> Most importantly to the local

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<sup>260</sup> *Id.* at 6.

<sup>261</sup> *See id.* at 6.

<sup>262</sup> *See id.* at 5-6.

<sup>263</sup> *See id.* at 7-8. Additionally, the two outlets have been able to work together on various community outreach initiatives, including education exhibits for local children and a “Law Officer of the Month” program. *See id.* at 10-11.

<sup>264</sup> *See* WMBB-TV Waiver Request.

<sup>265</sup> *See id.* at 6-7.

<sup>266</sup> *See id.* at 7-8.

Florida community, since the inception of the combination, the *Jackson County Floridian* and WMBB-TV jointly have prepared an annual hurricane tracking guide containing advice on local responses to threatening weather. The additional resources provided by the newspaper further ensure that WMBB-TV can remain on the air during a hurricane in the event that it loses power at, or access to, its main studio.<sup>267</sup>

A variety of other small-market and mid-market newspaper/broadcast combinations have experienced analogous operational efficiencies based on co-ownership, permitting them to devote additional resources to news and public affairs programming. In Spokane, Washington, *The Spokesman-Review* and KHQ-TV save tens of thousands of dollars each year through the combination of equipment and resources. The two media outlets often share photos and videos, and KHQ-TV has featured *Spokesman-Review* reporters on the air to comment about local events.

In Findlay, Ohio, *The Courier* and co-owned WFIN(AM) and WKXA(FM) currently realize a savings of approximately \$70,000 per year by combining staffing and resources, allowing the joint properties to remain competitive in the current challenging media environment. The companies pool resources for *The Courier's* website, making it a key news resource for the people in Findlay and the surrounding area. The combination prides itself on its community involvement, which it attests would not be as extensive if not for the synergies of cross-ownership. The ability of each media property to cross-promote community events provides additional avenues for the outlets to serve schools, community foundations, and other organizations. Finally, in Ponca City, Oklahoma, *The Ponca City News* and WBBZ(AM) are able to save approximately \$30,000 per year by

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<sup>267</sup> See *id.* at 9.



utilizing the same behind-the-scenes staffing. This efficiency has been responsible for WBBZ(AM)'s ability to serve as the primary broadcast information outlet in its market. It also has enabled the radio station to maintain its website and stream local content over the Internet. Further, the support of the newspaper is essential to various community efforts undertaken by the radio station.

Existing combinations in several larger markets also have experienced significant cross-ownership benefits. The newspaper/television combination owned by Belo Corp. ("Belo") in the Dallas market—the number seven television market in the nation—is one notable example. WFAA-TV consistently has had one of the highest rated local newscasts in its market and has offered a level of public affairs programming unrivaled by its peers. With the assistance of *The Dallas Morning News*, for example, WFAA-TV has been able to air what recently became the sole local talk show in Dallas, "Good Morning Texas." The program has aired on WFAA-TV since 1994 and became the sole local talk show on the air in Dallas in early September, as competing stations have chosen to air syndicated programming instead. Staffwriters from *The Dallas Morning News* often appear on "Good Morning Texas" as commentators and contributors.

The TV station and daily newspaper also routinely work together to provide the broadest possible coverage of local, regional, and national news. These efforts often result in multimedia packages that include print, on air, and web components. The websites for both media operations include information from the other outlet. In the case of *The Dallas Morning News*, its site streams video supplied by WFAA-TV; the WFAA-TV website, in turn, includes photography and stories prepared by reporters for *The Dallas Morning News*. The two co-owned media entities also share some operations space, including a Washington news bureau.

Thanks in part to the savings achieved by sharing resources between WFAA-TV and *The Dallas Morning News*, as well as Belo's television stations in Houston, Austin, and San Antonio, Belo also continues to operate Texas Cable News ("TXCN"), a 24-hour regional cable news network currently serving approximately 1.7 million cable customers with around the clock news gathered from each of Belo's Texas news outlets. In addition, Belo's local news outlets in Dallas and three other Texas markets combined resources in October 2006 to host and cover the only Texas gubernatorial debate in this election cycle between the four leading candidates in this year's election.<sup>268</sup> The debate was streamed live on multiple Internet sites and was widely viewed across the State of Texas—over-the-air, and on cable, satellite, and radio. In three of the four largest markets in Texas, the debate was the most watched program in its time slot.

As NAA and Belo have reported to the Commission in prior filings, WFAA-TV and *The Dallas Morning News* have been honored with a long list of prestigious awards.<sup>269</sup> The combination continues to attract national recognition. For example, *The Dallas Morning News* received a Pulitzer Prize in 2006 for its coverage of the Hurricane Katrina disaster.<sup>270</sup> The paper, along with the co-developed DallasNews.com website, also received an Associated Press Managing Editors Online Convergence Award this

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<sup>268</sup> *Belo's Texas-Based Operations to Host and Air 2006 Gubernatorial Debate*, Belo Corp. Press Release, (Oct. 5, 2006), at <http://www.belo.com/pressRelease.x2?release=20061005-1037.html> (last visited Oct. 11, 2006).

<sup>269</sup> See, e.g., Comments of Belo Corp. at Section III in MB Docket No. 01-235 (filed Dec. 3, 2001); Comments of Belo Corp. at Section II.A. in MB Docket No. 02-277 (filed Jan. 2, 2003).

<sup>270</sup> David Flick, *News Wins Pulitzer for Katrina Photos*, Dallas Morning News, Apr. 17, 2006, at <http://www.dallasnews.com/sharedcontent/dws/news/katrina/stories/041806dnnewpulitzer.44e06a36.html> (last visited Oct. 13, 2006).

year.<sup>271</sup> Similarly, WFAA-TV garnered a 2004 George Foster Peabody award and a 2005 Alfred I. duPont Columbia award for its news reporting.<sup>272</sup> Just recently, the station received 53 Emmy nominations from the Lone Star Chapter of the National Academy of Television Arts & Sciences, including nominations for station and news excellence, morning and evening newscasts, continuing coverage, and special programs.<sup>273</sup>

In the Atlanta market, the country's ninth largest, the newspaper/radio/television combination owned and operated by Cox Enterprises, Inc. ("Cox") consistently has offered more local news and public affairs programming than its peers. WSB-TV now airs seven more hours of news programming than its closest competitor, and it is currently the only television station in the market to feature a weekly community affairs show and editorials during its Sunday evening newscast. *The Atlanta Journal-Constitution* features additional daily local coverage, including local community zoned editions of the paper. WSB-TV also regularly contributes video content to

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<sup>271</sup> *The Dallas Morning News and DallasNews.com Receive APME Journalism Excellence Award for Online Convergence*, Belo Corp Press Release (Sept. 5, 2006), at <http://www.belo.com/pressRelease.x2?release=20060905-1020.html> (Oct. 13, 2006).

<sup>272</sup> *WFAA-TV Honored with Fourth Prestigious George Foster Peabody Award for 'State of Denial' Investigation*, Belo Corp. News Release, (Apr. 7, 2005), at <http://www.belo.com/pressRelease.x2?release=20050408-701.html> (last visited October 20, 2006); *Two Belo Television Stations are the Only Local Stations Nationwide to Win 2005 duPont-Columbia Awards*, Belo Corp. News Release (Jan. 13, 2005), at <http://www.belo.com/pressRelease.x2?release=20050113-661.html> (last visited October 20, 2006).

<sup>273</sup> *WFAA-TV Gathers 53 Lone Star Emmy Nominations Winners To Be Announced At October Ceremony in Houston*, Belo Corp. News Release (Sept. 22, 2006), at <http://www.belo.com/pressRelease.x2?release=20060922-1028.html> (last visited Oct. 17, 2006).

In addition, the benefits of group ownership generally are illustrated in the extraordinary efforts of Belo-owned WWL-TV in New Orleans, the only station to stay on the air through Hurricane Katrina and its aftermath. WWL-TV was able to draw upon resources from co-owned stations to provide 24-hour-a-day coverage, detailed local updates about evacuation routes as the hurricane approached, and reliable local news about the hurricane's impact on specific neighborhoods within the city. WWL-TV also served as a primary information resource as individuals searched for lost family members and friends, sought relief agencies, and needed answers to questions about safety concerns and returning to their homes.

<[www.ajc.com](http://www.ajc.com)>, the website of *The Atlanta Journal-Constitution*. In return, *The Atlanta Journal-Constitution* provides enhanced local sports and weather coverage for <[www.wsbtv.com](http://www.wsbtv.com)>, WSB-TV's website.<sup>274</sup>

In the number 14 Phoenix market, Gannett Co., Inc. ("Gannett") has used the combined resources of *The Arizona Republic*, KPNX-TV, and KNAP-TV to bring higher quality news to the public. With cost savings in excess of \$25,000 per year generated directly from the combination, Gannett has been able to refocus resources on its core news mission. As explained in greater detail in the comments to be submitted concurrently by Gannett in this proceeding, the results have been impressive. The media partners have relied on one another to supply distinctive content and to contribute to special reporting projects.<sup>275</sup> The public in the Phoenix metro area has received better programming as a result, including programs oriented toward local minority populations.<sup>276</sup>

Among the innovations that have resulted from the combination is <[www.azcentral.com](http://www.azcentral.com)>, a website developed jointly by *The Arizona Republic* and KPNX-TV. Both media outlets contribute news stories and other content to the website, and it often combines articles from the newspaper with video and other updates from television,

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<sup>274</sup> The Cox properties in the Atlanta market also use their considerable resources to benefit the community. Cox's media outlets, utilizing their vast staffing and media resources, organized a job fair for people relocated to the region from the Gulf Coast after Hurricane Katrina. Nearly 15,000 hurricane survivors attended the job fair, making it one of the largest in the nation. According to John Mellott, publisher of *The Atlanta Journal-Constitution*, this important event would have been impossible without the ability to combine resources from the newspaper/broadcast combination.

<sup>275</sup> See Gannett Co., Inc. Waiver Request (May 31, 2006), appended as Attachment 14 to Application for Renewal of Broadcast Station License, FCC Form 303-S, at [http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment\\_exh.cgi?exhibit\\_id=407172](http://svartifoss2.fcc.gov/prod/cdbs/forms/prod/getattachment_exh.cgi?exhibit_id=407172) ("KPNX-TV Waiver Request").

<sup>276</sup> See *id.* at 8 (discussing the ability of *The Arizona Republic* to devote additional resources to in-depth reporting because KPNX assists the paper in covering breaking news stories).

creating a multimedia experience for users of the site. Website editors also link this independent content with related stories on the individual sites maintained by the Gannett properties, allowing users to access additional information on a topic or event.<sup>277</sup> This unique delivery of news has made <azcentral.com> one of the more trafficked websites on the Internet.<sup>278</sup>

Tribune Company (“Tribune”) has witnessed comparable benefits from newspaper/broadcast cross-ownership. The Tribune combination in Chicago, the nation’s third largest market, provides perhaps the best case study. The *Chicago Tribune*, WGN-TV, and WGN(AM) have been able to streamline operations and provide more extensive informational coverage by taking advantage of both local efficiencies and company-wide resources. As a news/talk radio station, WGN(AM) takes advantage of the resources of its sister outlets in order to bring its local audience round-the-clock news, information, and discussion programming. WGN(AM) draws on co-owned resources in many ways, including by arranging for on-air interviews with and guest appearances by *Chicago Tribune* reporters, editors, and national and foreign correspondents on a regular basis. In addition, the radio station and its sister outlets jointly plan for coverage of special events, such as local and national elections. Each of these important resources enables WGN(AM) to provide more in-depth coverage to its local audience than is feasible for the vast majority of standalone radio stations.

Likewise, the *Chicago Tribune* works with WGN-TV to co-sponsor public opinion polls before major local, state, and national elections. WGN-TV’s chief meteorologist and his staff of professional weather forecasters, the largest of any station

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<sup>277</sup> See *id.* at 10-11.

<sup>278</sup> See *id.* at 11.

in Chicago, also provides a “weather page” for each daily edition of the *Chicago Tribune*, featuring custom-designed maps, an illustrated seven-day local forecast, detailed national weather statistics and forecasts, severe-weather predictions, astronomical data, interesting weather facts, and answers to reader questions that are far beyond the expertise of any local newspaper in America.

In addition, all three media outlets contribute to <www.chicagotribune.com>, enabling that website to offer far more content than otherwise would be possible. Both WGN-TV and WGN(AM) make streaming audio and video available for the website, and the site routinely turns to the expertise of the reporters and correspondents at each media outlet. Finally, Tribune has created CLTV, a 24-hour local cable all-news channel serving over one million households in the Chicago metropolitan area. CLTV draws on the resources of its co-owned newspaper, television, and radio outlets, and also contributes original content to each of these properties and their respective websites, offering material none of the outlets would have been able to develop on its own.

In sum, the extraordinary level of service offered by existing newspaper/broadcast combinations—now as throughout the past three decades—demonstrates that the prohibition on cross-ownership is detrimental to the public interest. The foregoing examples serve only to reinforce the conclusion reached by the Commission in 2003 that the blanket ban is counterproductive. Newspaper/broadcast combinations bring better and more varied news, public affairs, and other locally oriented programming to their markets. This remains the case because combinations are able to both share newsgathering resources and streamline operational staff and facilities. In the end, the

greatest value in allowing combinations may lie in such synergies.<sup>279</sup> The less money, time, and resources that must be devoted to behind-the-scenes operations, the more that can be devoted to better programming and to exploring new, unique ways to deliver local content to consumers.<sup>280</sup>

2. *Current Evidence Reinforces The Commission's Prior Conclusion That Newspaper/Broadcast Combinations Do Not Speak With A Single, Coordinated Voice*

Based on the wide range of empirical and anecdotal evidence presented to it in 2003, the Commission found no basis for concluding that existing combinations speak with a monolithic “voice” or from the same viewpoint.<sup>281</sup> Instead, the agency

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<sup>279</sup> As the Commission noted in its 2003 decision, “[g]iven the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues.” *2003 Order*, 18 FCC Rcd at 13,762 (¶ 360).

<sup>280</sup> Yet another example of the benefits of joint newspaper/broadcast operations is reflected in the recent agreement between The Washington Post Company (the “Post”) and Bonneville Broadcasting (“Bonneville”) to begin providing “Washington Post Radio” in the Washington, D.C. metropolitan area. As a result of the joint effort, *The Washington Post* began providing content and featuring editors, reporters, and columnists on a co-located AM station owned and controlled by Bonneville in March 2006. *Washington Post Radio to Debut in March 2006*, The Washington Post Company Press Release (Jan. 4, 2006), at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/01-04-2006/0004242465&EDATE=> (last visited Oct. 23, 2006). Andrew Schwartzman, President of the Media Access Project, praised the new arrangement and noted in particular that it would create “the diversity advantages of different viewpoints.” See Drew Clark, *Old Rules, New Alliances*, CongressDailyAm (July 31, 2006) at <http://www.drewclark.com/wiredinwashington/20060731.htm> (last visited Oct. 20, 2006).

NAA wholeheartedly agrees that this new radio station will enhance diversity of viewpoints, as well as augment the supply of local news and information. The newspaper’s ability to utilize an additional outlet permits it to bring some of its considerable resources to bear to provide expanded over-the-air news coverage and in-depth analyses to a new and different audience. Because of the cross-ownership ban, the Post and Bonneville were constrained to structure the new radio station operation as a non-attributable joint venture rather than a purchase and sale. As the Commission has recognized, however, the benefits of such joint ventures are inherently limited by the costs of reaching agreements, incentives to withhold private information from a market competitor, and incentives to take actions separately that may not be in the best interests of the joint understanding. See *2003 Order*, 18 FCC Rcd at 13,755-56 (¶346) (citing Gannett Comments in MM Docket No. 01-235 (filed Dec. 3, 2001), Exhibit C, Besen and O’Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper/Broadcast Station Cross-Ownership*). The benefits Mr. Schwartzman sees in Washington Post Radio, then, could be more readily achieved and more fully realized if the regulatory barriers were eliminated and cross-ownership were permitted.

<sup>281</sup> See Section II.B., *supra*.

determined, the evidence suggested that “common ownership ‘does not result in a predictable pattern of news coverage and commentary about important political events in . . . commonly owned outlets.’”<sup>282</sup> The Third Circuit agreed, affirming that the FCC’s conclusions on this matter were reasonable and supported by the record.<sup>283</sup>

The recent experiences of current newspaper/broadcast combinations substantiate the Commission’s prior findings. Newspaper publishers, radio program directors, and television program directors continue to indicate that newspapers and broadcasters in both large and small markets compete vigorously with one another, regardless of common ownership. Each media outlet strives to be the first to break major news stories, and the outlets typically do not prevent their reporters and commentators from criticizing actions taken by their sister outlets. Diversity of programming content and viewpoint in a local market is far less a matter of ownership structure than it is of market economics, business realities, professional standards, and—first and foremost—competition for audience attention.

For example, while the *The News-Gazette*, WHMS(FM), and WDWS(AM) have shared behind-the-scenes personnel and resources, each outlet in the Champaign-Urbana market competes directly with the others for news. *The News-Gazette* and the two stations maintain their own staffs of reporters who prepare independent stories on the news of the day. In fact, the publisher of *The News-Gazette* advises that he considers the radio stations to be his most intense competitors for local news.

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<sup>282</sup> 2003 Order, 18 FCC Rcd at 13,763 (¶ 361) (quoting MOWG Study No. 2).

<sup>283</sup> See *Prometheus*, 373 F.3d at 399-400 (noting that “the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the cross-ownership ban”).



Moreover, it is not uncommon for the radio stations and the paper to be on opposite sides of an issue or to actively disagree with one another. For example, in 2004, the newspaper printed a series of investigative reports about Mr. John Piland, a state attorney who was running for re-election in the Champaign-Urbana area. The paper criticized Mr. Piland's record as state's attorney at length and openly opposed his re-election campaign. On the other hand, a commentator on the highest-rated local talk show on WDWS(AM) was a strong supporter of Mr. Piland. The commentator went so far as to invite Mr. Piland to be a guest on his radio program several times, providing him ample opportunity to respond to the articles published by the newspaper.

In the same vein, Gannett reports that the news organizations of *The Arizona Republic* and its sister television stations in the Phoenix market are fully autonomous.<sup>284</sup> In fact, the newspaper's local television commentator often files reports critical of stories or programming decisions made by the Gannett-owned stations in Phoenix. Thus, while *The Arizona Republic* and the television stations have developed some protocols for coordinated coverage of major events in the Phoenix area, there is no coordination of the viewpoints expressed in the final stories created about that event, and the media outlets often take positions that are antagonistic to one another.

A similar situation exists at the Cox-owned newspaper, television station, and radio stations in the Atlanta market. The news staffs of *The Atlanta Journal-Constitution*, WSB-TV, and the Cox family of radio stations in Atlanta are completely independent of one another. Each outlet makes its own decisions about what stories to cover and how to cover them. Although there is some limited coordination and sharing

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<sup>284</sup> See KPNX-TV Waiver Request at 15.

of resources on the websites for each media outlet, their news operations are distinct. In fact, *The Atlanta Journal-Constitution* and WSB-TV often take editorial positions that are antagonistic to one another. The editorial board at each outlet is separate and independent, free to criticize whomever the board wishes, including its own parent company. By way of example, the editorial board at *The Atlanta Journal-Constitution* recently took a position in direct opposition to that being espoused at Cox corporate headquarters on the contentious—and, for Cox, competitively sensitive—issue of whether to deregulate local franchising requirements for cable operators and other video entrants.

This theme is repeated throughout the existing combinations. The Tribune combination in Chicago, consisting of the *Chicago Tribune*, WGN-TV, and WGN(AM), actively competes for news content. Each independent newsroom tries to break exclusive stories, and the three newsrooms are quick to give another newsroom credit for exclusives. *The Spokesman-Review* and KHQ-TV in the Spokane, Washington market also have independent staffs at each outlet responsible for making the final decision on what local events to cover and how to cover them. The outlets do not share the same news staff and use independent sources to gather the news of the day.

A number of other newspaper/broadcast combinations indicate that their news operations act separately and independently, even if they share some staffing and coordinate resources. Although the editors of *The Free Lance-Star* and the news directors at the co-located radio stations in the Fredericksburg, Virginia area meet almost daily to discuss local news and events, each organization independently decides what stories to cover and how to cover them. In fact, the associate publisher of *The Free Lance-Star* avers that, while the newspaper and radio stations may discuss coverage of

major local news stories, there often are multiple reporters from the paper and the stations covering the same story at the same time, each providing an independent perspective on the event.

Indeed, current newspaper/broadcast combinations indicate that it does not serve their interest to speak with a monolithic voice. Rather, co-located media outlets under common ownership have strong business incentives to diversify their program or content offerings in order to reach the largest possible aggregate audience. The Commission noted this trend in 2003: “[A]s the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints.”<sup>285</sup> Thus, because today’s consumers demand access to a wide variety of voices, combinations strive to offer that variety in order to maximize their audience. By contrast, an independently operating or standalone media outlet may have an incentive to focus on “mainstream” content or “greatest common denominator” programming in order to attract the largest possible audience for that one outlet.<sup>286</sup> Accordingly, not only would elimination of the prophylactic cross-ownership ban almost surely enhance localism and viewpoint diversity by enabling media outlets to devote more resources to the coverage of local news and information, it also likely would have the same effect by increasing the incentives to differentiate the content offered by each outlet.

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<sup>285</sup> 2003 Order, 18 FCC Rcd at 13,764-65 (¶ 364); see also NAA 2001 Comments at 43-46 (describing the consumer-driven incentives that encourage newspaper/broadcast combinations to offer consumers a variety of voices).

<sup>286</sup> See NAA 2001 Comments at 44-45 (discussing the theory of “greatest common denominator” programming); see also 2001 Newspaper/Broadcast Cross-Ownership NPRM, 16 FCC Rcd at 17,291-92 (¶ 17); Rules and Policies Concerning Multiple Ownership of Radio Stations in Local Markets, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19,861, 19,877 (¶ 37) (2001). In contrast, combinations can use the operational benefits of owning multiple outlets to program to other segments of the market. Varying content in this way would draw the largest overall audience.

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At the same time that the local media marketplace grows ever more diverse and competitive, the evidence that newspaper/broadcast cross-ownership provides local audiences with superior local news and information without sacrificing diversity continues to accumulate. As has been the case since the Commission first imposed the cross-ownership ban over three decades ago, daily newspaper publishers remain the best candidates to enhance the performance of co-located broadcast stations and, in particular, to augment local television and radio news offerings. And in light of the increasingly challenging competitive environment facing today's newspaper and broadcast outlets, allowing them to capitalize on the efficiencies inherent in cross-ownership—and thereby to continue to thrive in the local news and information marketplace—is more critical than ever.

**IV. THE FCC SHOULD MOVE FORWARD TO ELIMINATE THE CROSS-OWNERSHIP BAN BASED ON THE VIRTUALLY UNLIMITED AVAILABILITY OF LOCAL NEWS AND INFORMATION OPTIONS IN TODAY'S MEDIA MARKETPLACE**

As demonstrated above, the evolution that has occurred in the media marketplace over the past several years overwhelmingly confirms that the FCC was headed in the right direction in its 2003 repeal the antiquated newspaper/broadcast cross-ownership ban. The continued expansion, and increased fragmentation, of the news and information options available to today's local consumers makes clear that cross-ownership restrictions are not at all necessary to protect the diversity of viewpoints available in local media markets. The case for elimination of the ban is solidified by the continued evidence that cross-ownership substantially enhances localism without posing any appreciable threat to viewpoint diversity. What is more, the compelling need to allow newspapers and

broadcasters to compete on an even playing field with their news and information rivals has become even more apparent since 2003. Thus, it is now beyond doubt that the Commission should finish the job it started in 2003 and move forward to finally eliminate its long-outdated restriction on newspaper/broadcast cross-ownership.

In order to do so, of course, the agency must first address the Third Circuit's specific objections to the agency's prior diversity analysis and, in particular, the Diversity Index. NAA submits that the appropriate response to the concerns raised by the court is relatively simple. Consistent with the core purpose of the FCC's diversity objectives, the Commission should focus on the availability in the contemporary marketplace of an abundant and ever-expanding array of local news and information alternatives to today's local consumers. Viewed from this perspective, there can be no question that restrictions on cross-ownership serve no public interest purpose and should be eliminated.

**A. There Is No Need, And In Fact It Would Be Counterproductive, To Attempt To Recreate The Diversity Index**

In order for the FCC to reach a reasoned decision in this proceeding that responds to the concerns raised by the Third Circuit, NAA submits that it is neither necessary nor practical for the Commission to either attempt to fix the perceived flaws in the Diversity Index or formulate an alternative diversity "metric." In fact, the inherently elusive concept of diversity, coupled with the dizzyingly complex nature of news and information dissemination and consumption in today's media marketplace, would make such an exercise hopelessly frustrating and ultimately futile. In any case, the Diversity Index was not a necessary component of the agency's prior decision to eliminate the blanket cross-ownership ban. An alternative method that would purport to precisely measure the relative importance of local news and informational voices also is not

required to resolve, and would needlessly complicate, the issues at stake in this proceeding.

The perceived flaws in the Diversity Index stem largely from the inherent impracticality of attempting to reduce the intangible concept of viewpoint diversity to numerical precision. As Chief Judge Scirica observed in his dissenting opinion in *Prometheus Radio Project*, “[p]reserving the ‘marketplace of ideas’ does not easily lend itself to mathematical certitude.”<sup>287</sup> In comparison to “other independent federal agencies” that “may act with greater measurable precision in reducing pollution emissions, defining safety standards or even establishing interest rates, the FCC operates in the less scientific arena of speech and debate.”<sup>288</sup> In this province, “the Commission’s mandate to maintain viewpoint diversity in the national broadcast media is complicated both by the ‘elusive’ concept of diversity, and by the inherent uncertainty regarding the prospective effects of structural rules.”<sup>289</sup> Even in its decision incorporating the Diversity Index, the FCC similarly concluded that measuring diversity is “as much art as science.”<sup>290</sup> In confronting the challenge of identifying markets that might give it cause for concern in terms of preserving diversity of viewpoint, the agency further observed that “[d]iversity’ is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations.”<sup>291</sup>

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<sup>287</sup> *Prometheus*, 373 F.3d at 436.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*; see also *Sinclair Broadcast Group*, 284 F.3d at 159 (noting that “programming diversity” involves issues that are “elusive” and “not easily defined”).

<sup>290</sup> 2003 Order, 18 FCC Rcd at 13,793 (¶ 441).

<sup>291</sup> *Id.*

If anything, the accuracy of these observations has become even more evident in the few short years since the Commission last considered the cross-ownership ban. As described in detail above, today's marketplace for news and information is more crowded and intricate than ever before. As new options proliferate and the ability to acquire news and information on an on-demand basis continues to accelerate, individuals increasingly are creating unique news consumption habits to fit their personal needs and interests. For one thing, the mix of media selected often varies greatly according to the particular topic at issue. While traditional media tend to focus on high-profile or community-wide issues, for example, alternative media often play a pivotal role in the coverage of highly localized, or even neighborhood specific, issues, such as school board elections, neighborhood crime, or zoning disputes. Indeed, the more "local" an issue is, the more important smaller or more narrowly focused niche outlets—such as weekly newspapers, local online forums, neighborhood newsletters, or Web-based message boards—are likely to become. Any attempted generalizations about average consumer usage patterns or the market shares of individual media outlets thus inevitably will underestimate the relative significance of these outlets.

In addition, of course, news consumption also varies according to age group, personal schedule, individual interests, and myriad other considerations. Adding yet another layer of complexity is the trend toward so-called "concurrent media exposure," whereby consumers increasingly are taking in more than one type of media simultaneously.<sup>292</sup> And as new technologies and sources of information enter the media landscape, which they undoubtedly will continue to do at a head-spinning pace,

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<sup>292</sup> See Section III.A.1, *supra*.

consumers' news consumption patterns inevitably will continue to evolve. In this ever-shifting and highly personalized environment, any attempt to subject the relative importance of one news outlet vis-à-vis another to exact measurements or a precise formula necessarily would be unworkable.

In any event, as NAA and several other parties previously have explained, the Diversity Index simply was not critical to the Commission's prior decision to eliminate the newspaper/broadcast cross-ownership rule.<sup>293</sup> Rather, the essential considerations underlying that decision were empirical and real-world evidence regarding the lack of economic competition between newspapers and broadcast outlets, the significant public interest benefits to be gained through common ownership, the impressive records of existing combinations, and the evidence regarding the explosive growth in local media outlets since the ban was implemented over 30 years ago.<sup>294</sup> The agency used the Diversity Index as a "methodological tool" to inform its judgments and give its new Cross-Media Limits some "empirical footing."<sup>295</sup> As the decision adopting the revised limits expressly states, however, the Diversity Index "inform[ed], but d[id] not replace [the FCC's] judgment in establishing rules of general applicability that determine where [it] should draw lines between diverse and concentrated markets."<sup>296</sup>

The Diversity Index, or any analogous set of audience reach or outlet popularity measurements, also is not a necessary element of this proceeding. As was true in 2003,

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<sup>293</sup> See *2001 Newspaper Intervenors Third Circuit Brief* at Section V.A.1.

<sup>294</sup> *2003 Order*, 18 FCC Rcd at 13,767 (¶¶ 368-69).

<sup>295</sup> *Id.* at 13,791, 13,775 (¶¶ 433, 391).

<sup>296</sup> *Id.* at 13,776 (¶ 391). Instead, the new rule was "based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice." *Id.* at 13,791 (¶ 435).



the vast evidentiary record before the agency in this and prior rulemakings is far more than sufficient to provide the basis for the Commission to make well-informed determinations concerning cross-ownership. Thus, the FCC reasonably can, and unequivocally should, move forward expeditiously to finally eliminate the long outdated newspaper/broadcast cross-ownership rule without expending scarce agency resources in attempting to reinvent the Diversity Index or any other diversity “metric.”

**B. Availability Of, Or Access To, A Sufficient Number Of Local News Alternatives, Is The Logical Basis For The Commission’s Analysis**

Dispensing with the Diversity Index, the FCC can greatly simplify its analysis in this proceeding by focusing on whether consumers in individual media markets have a sufficient number of local news and informational outlets available to them to ensure that they will be well-informed and exposed to a variety of viewpoints. So long as local audiences have an adequate variety of local news and informational choices at their disposal, the relative audience reach, market share, or popularity of one outlet versus another should be irrelevant.

Indeed, NAA submits that the concept of “weighting” media outlets is antithetical to the very concept of viewpoint diversity. As the Commission itself explained in its *2003 Order*, “viewpoint diversity refers to the *availability* of media content reflecting a variety of perspectives.”<sup>297</sup> It does not, at its core, concern the “market share” held by any one market participant.<sup>298</sup> While, for example, relative market share within a

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<sup>297</sup>*Id.* at 13,627 (¶ 19) (emphasis added); *see also id.* at 13,776 (¶ 393) (“Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues.”); *id.* at 13,777 (¶ 394) (“Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market.”).

<sup>298</sup>The Commission expressly recognized that availability, rather than market share, is the key to its diversity analysis in justifying its decision to include the Internet in the Diversity Index: “We include the

particular media sector could be relevant to measuring the level of competition for local advertising revenue, it does not matter if one voice speaks “louder” than another for purposes of assessing the diversity of local news and informational viewpoints available in that community—it matters only that different voices speak, and can be heard by any who choose to listen.

It also makes sense for availability, as opposed to some form of audience share, to be the basis for the FCC’s diversity analysis in light of the complex and constantly changing ways in which consumers acquire local news and information in today’s environment. As explained in detail above, Americans (especially in today’s burgeoning news and information marketplace) create their own highly tailored and constantly evolving mix of news and informational inputs depending on their specific needs and interests at any given time. Now included in this complicated and ever-shifting mix of options is the element of interactivity made possible by the Internet, which allows any individual citizen to add an opinion or insight on virtually any imaginable topic. Moreover, unlike their consumption of many products, individuals do not acquire news and information from one source to the exclusion of another. The acquisition of factual information and the development of opinions concerning that information is cumulative rather than finite. Each bit of information adds to, and often alters the previous state of, knowledge and opinion. Simply put, the availability of news and information is not

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Internet [in the Diversity Index] because, as previously indicated, we are looking at availability of media, not the popularity of specific publications, stations, cable channels, or websites.” *Id.* at 13,789 (¶ 427). In this vein, the agency further explained that “[t]here is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events. We cannot pretend that these are not in the ‘diversity’ mix simply because only a small number of people may visit them.” *Id.*

analogous to the supply of widgets, nor of other tangible goods manufactured and consumed in easily measured quantities.

The amount of time that consumers may spend with any one news outlet does not necessarily correspond to the relative importance of that medium as a source of local news and information. While some consumers may spend several hours in a typical day tuned in to local television or radio news in the background, the relatively short amount of focused time spent reading a local news article in print or online may be a much more fruitful and influential source of information. Even if one news outlet has a larger overall audience share than another, one cannot conclude with any certainty that this outlet is relatively more important than another with respect to a specific issue or a certain individual.

In addition, attempting to analyze diversity on the basis of audience reach or market share instead of availability, the Commission would be improperly discounting the checks-and-balances role that less popular media outlets often perform in local markets. As the FCC has acknowledged, alternative media can play a critical watch-dog role with respect to the major media outlets.<sup>299</sup> The importance that alternative media,

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<sup>299</sup>See *id.*, 18 FCC Rcd at 13,779 (¶ 401). Real-life examples of this phenomenon include local media watchdog blogs, such as Save Richmond, at <http://www.saverichmond.com/> (last visited Oct. 13, 2006), which won the 2005 Laurence E. Richardson Freedom of Information Award, for its investigation of funding problems with the Virginia Performing Arts Center, an issue that local Richmond media had declined to tackle. See Conaway Haskins, Editorial, *Who's Watching the Richmond Media?*, Bacon's Rebellion, Sept. 13, 2006, at <http://www.baconsrebellion.com/Issues06/09-25/Haskins2.php> (last visited Oct. 13, 2006); Lisa Provence, *Richmond Bloggers Score Award*, The Hook (Charlottesville, Va.), Nov. 24, 2005, at <http://readthehook.com/stories/2005/11/23/newsFoiaRichmondBloggersSc.html> (last visited Oct. 13, 2006). Other blogs and websites which serve a similar role as watchdogs of local news coverage include Grade the News, at <http://www.gradethenews.org/> (last visited Oct. 13, 2006) (evaluating print and broadcast news in the S.F. Bay Area), Boise Guardian, at <http://www.boiseguardian.com/> (last visited Oct. 13, 2006) (a watchdog blog for local media and politics in Boise, Idaho), Ron Fineman's On the Record, at <http://ronfineman.com/> (last visited Oct. 13, 2006) (a subscription-based website that critiques TV news coverage in the L.A. area), the blog of Ronald Wesley Maly, at <http://www.rmaly.blogspot.com/> (last visited Oct. 13, 2006) (a blog that acts as a watchdog of the *Des Moines Register*), and Colorado Media Matters, at <http://colorado.mediamatters.org/> (last visited Oct. 13, 2006) (a state-based project of the

which typically have a smaller audience than traditional outlets, have in the marketplace for ideas in this respect would not be captured by a market-share based diversity analysis. As noted above, moreover, alternative media are more apt to serve as particularly important sources for highly localized or “special interest” issues, another concept that would not be reflected in a share-based approach to cross-ownership regulation.

Given all of these highly complex moving parts, it is far more logical and feasible for the Commission to take cognizance of the large number and ever-growing range of options generally available to local consumers of news and information than to enter the quagmire of trying to determine which ones are “more important” or “more influential.” Accordingly, NAA submits that the only workable way to evaluate the diversity in local markets—and the only way that is truly consistent with the core concept of viewpoint diversity—is on the basis of the availability of a range of alternative local news and informational options to consumers.

**C. Based On The Abundant Sources of Local News And Information That Now Exist In Virtually Every Local Market, The Discredited Newspaper Ban Should Eliminated**

As the FCC already has determined and the Third Circuit has affirmed, the blanket ban on cross-ownership can no longer be justified and, thus, must be modified. Further, both the FCC and the Court of Appeals agree that no restriction on cross-ownership is necessary for purposes of competition and that allowing newspaper/broadcast combinations will enhance localism. Thus, the limited question that the Commission must address in this proceeding is whether restrictions on cross-

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national Media Matters, a progressive news watchdog that monitors news outlets for “conservative misinformation”).

ownership remain necessary in the public interest in order to preserve local viewpoint diversity.

As explained in the foregoing section, NAA submits that the most logical and practical way to approach this question is by recognizing the enormous number and ever-increasing variety of sources of local news and information available in the current media marketplace. From this perspective, the analysis is simple, and governmental intrusion is clearly unnecessary and inappropriate. Consumers in every market in the United States have an overwhelmingly large menu of traditional and alternative options for local news and information, including daily and weekly newspapers (with an expanding number of free dailies thrown into the mix), television stations, radio stations, local and regional cable news channels, local and regional magazines, and of course, the myriad information sources accessible via the Internet.

This last option alone should give the Commission comfort that consumers would continue to have a wealth of local news and informational options at their disposal, even if the agency were to completely eliminate its local media ownership rules. As demonstrated above, the spiraling growth of the Internet in all respects—including as a source of news and information—has had, and undoubtedly will continue to have, a transformative impact on the number of news and information options available in virtually all local markets.<sup>300</sup> Online sources of local news and information proliferate from traditional media providers, independent news aggregators and creators, and citizen journalists alike. Given the infinite capacity on the Internet and its escalating importance to consumers, it cannot credibly be disputed that the local news and informational options

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<sup>300</sup> See Section III.B., *supra*.

it offers will continue to multiply at a heady pace in the foreseeable future. NAA believes that the Third Circuit was incorrect when it found in 2004 that there was insufficient evidence then to conclude that the Internet makes a significant contribution to the diversity of local news and informational voices. Regardless of the accuracy of the court's observations over two years ago, however, the evidence today is clear and convincing: the contribution of the Internet can no longer be ignored and must be given due consideration in assessing the options that consumers now have at their disposal.

On the flip side of the incontrovertible evidence that consumers in the current media landscape have a plethora of local news and informational options is the lack of credible evidence that jointly owned daily newspapers and broadcast outlets necessarily express common viewpoints or otherwise limit diversity in the information marketplace. This has been demonstrated by NAA and other parties in this and prior proceedings, acknowledged by the FCC, and affirmed by the Third Circuit.<sup>301</sup> What is more, as the FCC concluded in 2003, permitting greater levels of cross-ownership is apt to *increase* the diversity of news and information available at the local level—"the record indicates that cross-ownership of newspapers and broadcast outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public."<sup>302</sup>

Accordingly, there simply is no basis for concern that permitting local daily newspapers and broadcast outlets to combine resources and operate jointly would have any detrimental impact on the wealth of viewpoint diversity available in virtually every local market. Continuing to impose arbitrary constraints on the freedom of newspaper

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<sup>301</sup> See Section III.C., *supra*.

<sup>302</sup> 2003 Order, 18 FCC Rcd at 13,760 (¶ 355).

publishers and broadcasters to utilize alternative delivery mechanisms and capitalize on the efficiencies of combined operations, on the other hand, will inevitably limit their ability to remain competitive in the current media environment and effectively serve the needs and interests of their local markets. Thus, the Commission should finally move forward to complete the proceedings and eliminate the archaic cross-ownership restriction.

## **V. CONCLUSION**

NAA respectfully submits that the FCC must move forward expeditiously and, at long last, eliminate the blanket prohibition on newspaper/broadcast cross-ownership. This duty is clearly set forth in the periodic review mandate of the 1996 Act and was unambiguously confirmed by the Third Circuit, which agreed with the FCC's conclusion that the absolute restriction no longer serves the public interest. In carrying out this requirement as well as the court's specific remand instructions, the FCC must remain mindful that the court of appeals also affirmed the agency's prior findings that restrictions on cross-ownership do not serve its goal of preserving marketplace competition and are inimical to its localism objections.

In considering the limited issue of whether any prohibitions on cross-ownership remain necessary in order to protect viewpoint diversity, the Commission must carefully consider the additional evolution and fragmentation that has occurred in the media marketplace since the agency last considered the issue. In particular, over the past several years, the Internet has continued to develop as an ubiquitous and critical source of both national and local news and information. This continued shift, as well as other dramatic marketplace changes, only serve to confirm the existence of a "new paradigm" and make the case for complete elimination of the cross-ownership restriction even more

compelling than in it was in 2003. Especially in light of the economic challenges currently facing the newspaper industry, the discriminatory over-regulation embodied in the cross-ownership rule serves only to hinder diversity by impairing the ability of newspaper publishers to devote resources to achieve operational efficiencies and devote resources to the production of news and informational programming.



Finally, NAA submits that it is not necessary, and in fact would be counterproductive, for the agency to attempt to resurrect the Diversity Index in carrying out the Third Circuit's remand directive. Instead, consistent with the core objectives underlying its diversity goal, the Commission should focus on the availability of a vast array of local news and information to meet every consumer need and preference. Viewed from this perspective, it is inescapably clear that restrictions on cross-ownership simply have no place in today's abundant media environment.

Respectfully submitted,

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## **STATEMENT OF PAUL J. BOYLE**

1. I am Senior Vice President for Public Policy for the Newspaper Association of America (“NAA”). The NAA is a non-profit organization that represents the newspaper industry and over 2,000 newspapers in the United States and Canada.

2. NAA members account for approximately 90 percent of the daily circulation of newspapers in the United States. A number of NAA’s members also hold broadcast station licenses, some in the home markets of their newspapers. The great majority of these were issued prior to the adoption of the newspaper/broadcast cross-ownership prohibition in 1975 and therefore “grandfathered” when the prospective ban was implemented. A few additional combinations are operated pursuant to waivers of the newspaper/broadcast cross-ownership prohibition or pending the station’s next renewal proceedings.

3. In August-September 2006, the NAA conducted an informal and confidential survey of the newspaper/broadcast cross-owners among its members. These newspaper/station owners were asked to comment on five general areas: (i) the amount of news (both local and national) and public affairs programming and publishing that the respondents’ outlets provide in relation to their competition; (ii) the degree to which resources and facilities are shared among the respondents’ newspaper and broadcast outlets, if at all; (iii) whether there is a difference in editorial posture/news judgment between the respondents’ broadcast and news properties; (iv) any additional programs, services, or products that the newspaper/broadcast combination(s) have enabled the respondents to develop/provide to their communities, including those available on the Internet; and (v) the competitors the newspaper/broadcast combinations face in the local areas they serve. It is my understanding that counsel at Wiley Rein & Fielding LLP made follow-up calls to several survey respondents for more information about their responses.

4. The responses to our inquiries were generally consistent and, moreover, consistent with my understanding and expectations based on my own involvement with the newspaper industry. Most of the cross-owned properties that replied provide at least as much, and in many cases, much more, local and national news, public affairs, and other informational programming than their competitors. And they do so in the face of increasing competition in the marketplace. Several of the cross-owned outlets also indicated that they have received some of the industry's most prestigious honors and are generally the top stations in their respective markets.

5. A substantial number of the cross-owners who replied to our survey indicated that they realize considerable efficiencies and cost savings by (i) sharing staff members in various aspects of their businesses, including advertising sales, technical services, administrative/business functions, human resources, newsgathering, and/or news reporting; (ii) sharing physical facilities and thus reducing rent and overhead costs; and/or (iii) sharing newsgathering resources such as news bureaus, wire services, cameras, vehicles, and helicopters.


6. The responses also confirmed that the efficiencies and operational synergies realized by many co-owned newspapers and broadcast stations have enabled them to effectively develop innovative media outlets and services for the distribution of information to their consumers. Many of the respondents stated that they have utilized their aggregate expertise in publishing and audio/video journalism to develop state-of-the-art websites offering unique locally-oriented content. Some co-owned newspaper and broadcast stations have combined their journalistic skills and audio/video expertise to launch successful local cable news channels.

7. The respondents generally indicated that, notwithstanding their sharing of resources, the editorial posture/news judgment of their cross-owned newspaper and broadcast properties is made independently by each outlet, based on journalistic principles, technical

capabilities, and relevance to their respective audiences. The responses also confirmed that co-owned daily newspapers and broadcast stations tend to compete vigorously with each other, taking each other to task for perceived errors, omissions, and/or differing points of view—regardless of whether operation or management of the print and broadcast outlets is integrated.

8. I participated directly in the preparation of, and have reviewed, the accompanying Comments of NAA. These Comments include numerous examples of experiences of existing newspaper/broadcast station combinations which, except where otherwise noted, are derived from the results of our informal survey and follow-up discussions with respondents. To the best of my knowledge, information, and belief, the information contained therein regarding the newspaper and broadcast operations of these existing combinations is true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

  
Paul J. Boyle  
Senior Vice President for Public Policy  
Newspaper Association of America

October 18, 2006